Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

No. __-____

IN THE

Supreme Court of the United States

October Term, 1989

ATLANTIC RICHFIELD COMPANY, INC.,

Petitioner,

v.

DANIEL KIMBRO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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May 15, 1990

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Petitioner, Atlantic Richfield Company, Inc. ("ARCO") prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered February 14, 1990, which reversed the judgment of the U.S. District Court for the Western District of Washington at Seattle.

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in reversing the trial court on the basis of oral remarks by the trial judge at the conclusion of the trial which the appeals court treated as a finding of fact, where the trial judge refused to make the disputed finding in her formal Findings of Fact and Conclusions of Law.

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REFERENCE TO THE REPORTS OF OPINIONS BELOW

Kimbro v. Atlantic Richfield Company, Inc., 889 F.2d 869 (9th Cir. 1989).

STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment of the Ninth Circuit Court of Appeals entered on February 14, 1990, which was issued on a Petition for Rehearing of the judgment entered on November 14, 1989. The statutory provision conferring jurisdiction is 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

Federal jurisdiction was on diversity grounds. The full pertinent text of the state statute involved appears in the Appendix.

STATEMENT OF THE CASE

A. Overview.

Plaintiff was terminated by his employer ARCO because of poor attendance, particularly tardiness. His tardiness problems were claimed by Plaintiff to be due in part to serious migraine headaches, causing him to take medication which he claimed caused him to be drowsy, oversleep and be tardy for work. His tardiness was tolerated for a period of time but eventually Plaintiff was terminated when his punctuality did not improve. He filed suit in state court challenging his dismissal and the case was removed to federal court on diversity grounds.

The District Court agreed that it would be unreasonable for ARCO to work around Plaintiff's undependable schedule, which is the accommodation he had requested, and alternatively concluded that ARCO was excused from considering accommodations for Plaintiff because management was not fully aware of his medical condition. Finding error in the conclusion that accommodation was legally excused by management's unawareness, and erroneously believing (based on her remarks at the conclusion of the trial) that the trial judge had found that a leave of absence would have been a reasonable accommodation and not an undue burden on the company, if accommodation had been legally required, the Court of Appeals reversed the District Court.

ARCO petitioned the Court of Appeals for a rehearing, *inter alia*, on the following grounds: (1) Although it may be unclear in the record, the trial judge ultimately *refused* to make a finding that an unsought leave of absence would have been a reasonable accommodation and not an undue burden. The trial judge's off-the-cuff remarks are not consistent with her formal findings on this point and therefore cannot be considered as a fact-finding. (2) Because under Washington

law, which governs this diversity case, it is a question of fact whether granting a leave of absence is a required reasonable accommodation, either the trial judge should be upheld (having specifically refused to find that a leave of absence would have been a reasonable accommodation) or, if the Court of Appeals believed that the trial judge meant to find that a leave of absence would have been a reasonable accommodation, then there is a lack of clarity in what the judge actually did determine, and the case should be remanded to the trial court for a finding on this point. (3) Under governing case law and court rule, an appellate court is not permitted to attribute to the trial court a "finding" based on oral remarks in the circumstances of this case.

ARCO's petition for rehearing was denied. Further review is now sought, on grounds that the Opinion of the Court of Appeals is contrary to precedent, including cases resting upon Supreme Court authority, which provide that a trial judge's oral remarks do not qualify as a finding unless they are "direct and clear and consistent with the formal findings, serving merely to supplement them," *Southern Pacific Land Company v. United States*, 367 F.2d 161, 162 n.1 (9th Cir. 1966), *cert. denied*, 386 U.S. 1030. By contrast, what is involved in this case is a finding the trial court specifically refused to make, as discussed further below. The Court of Appeals has strayed so far beyond accepted rules for utilizing a trial court's oral remarks to interpret or supplement its findings that this Court is asked to correct the situation as supervisor of the federal court system.

B. Discussion of the Facts Relevant to the Issues Presented for Review

Plaintiff claimed his oversleeping was due to medication for his headaches. He asked ARCO to tolerate his undependability, allowing him either to make up the hours of work he missed at the end of shift or on weekends, or alternatively by

paying him out of his sick leave "bank" for the time he was late without making it up. He never asked for a leave of absence to take time off until he got better or to seek treatment or to improve his condition to the point he could comply with ARCO's dependability standards. In fact, his condition worsened, and it wasn't until five years later (after frequent recurrences) that he found a medical treatment which he believed would allow him to control his debilitating headaches.

Even at trial, it was not a leave of absence that Plaintiff said would have been a reasonable accommodation. Rather, it was a request for flexibility in his work schedule, to work around his undependable attendance.

The trial judge agreed it would be unreasonable to work around Plaintiff's undependable attendance in running ARCO's oil refinery. However, in her remarks at the conclusion of trial, the trial judge made the following comments which were interpreted by the Court of Appeals as declaring that granting a leave of absence would have been a "reasonable accommodation":

> Dealing with the handicap first, the tragedy in this case really is that neither the Plaintiff nor ARCO saw Plaintiff as being handicapped. He didn't make it clear to them that he was handicapped. They looked at his record for the last three years and would have no reason to believe that his migraine headaches were causing him the problem. He had four sick days in 1981, as I recall his headaches, none in '79, none in '80, and in '81, four days. He had a variety of other absences in those days.
>
> Plaintiff makes a compelling argument in retrospect, and in my opinion, cluster migraines can be and are a handicap. But really, whose responsibility is it to establish that handicap to allow ARCO to determine whether they can or cannot make accommodations. In my opinion they could make accommodations, reasonable accommodations,

which they did in the past. When he had a series of cluster migraines before, Jackson told him "You don't have to keep calling in or waking yourself up every day to call in and say you've got a headache and can't come to work."

They (ARCO) could have accommodated him by allowing him to use sick leave, had he asked for it; given him a leave of absence, had he asked for it. I think it would be unreasonable to say that they had to accommodate him on an hourly tardiness basis. That's no way to run a refinery or a machine shop in a refinery. They cannot be expected to accommodate erratic attendance hourly.

But if a handicap is established which is, as his was, in remission for years on end, and it takes two or three months, or whatever, that could be accommodated. But as we see in the *Reese* case, they came forward with medical evidence. They asked that he be allowed to wear a gas mask or to have light duty. We have none of that testimony in this case. We have, unfortunately, Plaintiff thinking that he could manage it and telling Jackson "I've got it under control. I'm taking medication and I can do the job. I can manage it. I'm just having trouble waking up."

Now, whose responsibility is it to see that Plaintiff gets to work? Should the employer have to call him? If a telephone call would wake him up by one of his fellow workers, couldn't he have arranged to have a wakeup call somewhere, some time every day, if necessary? Couldn't he have arranged to have two or three or four or five alarm clocks?

I think he was managing it but I think he just fell down toward the end. He got the warning letters and three absences later, three lates later, he was fired, and in none of that time did he tell anybody but Jackson that he was having headaches and medication was preventing him from getting to work. Jackson reportedly told his bosses that there was a problem; that he was taking medication, but when you look at the record over the last three years that they looked at, they did not see any one single problem that would indicate to them a handicap.

As directed, ARCO's counsel prepared proposed Findings and Conclusions; Plaintiff's counsel prepared counter-proposals.

Plaintiff proposed the very fact-finding attributed by the Court of Appeals to the trial judge:

> *Plaintiff's Proposed Findings:*
>
> 30. ARCO could have accommodated Plaintiff's cluster migraine condition informally, as his supervisor had earlier by allowing him to rest or go to the medical office during acute phases; or by allowing him to use sick leave when he could not work; *or by allowing him a leave of absence during a period of acute phases.* (Emphasis added.)

Plaintiff argued the basis for this fact-finding was the "court's oral decision of March 4, 1987." (Plaintiff's Memorandum In Support of Proposed Findings and Conclusions, p. 4.) Plaintiff also proposed a conclusion of law which would have rested the court's conclusion that ARCO did not fail to make a legally required accommodation for Plaintiff's handicaps (Conclusion of Law, No. 3) on the sole basis that upper management was not chargeable with Plaintiff's supervisor's knowledge of his handicap (a ground never argued by ARCO). In response the trial court added the alternative holding to the effect that failure to make any reasonable accommodation otherwise required would be legally excused due to ARCO's ignorance as to the extent of Plaintiff's medical condition. But the court's primary holding remained that there was no accommodation which ARCO failed or refused unreasonably to make. This was consistent with the trial judge's rejection of Plaintiff's proposed finding that a leave of absence would have been a reasonable accommodation.

ARGUMENT

In its Opinion the Court of Appeals, correctly, attributes to *Phillips v. Seattle*, 111 Wn.2d 903, 766 P.2d 1099 (1989), the rule in Washington that whether an employer can be required to allow a leave of absence as a reasonable accommodation is a question of fact for the trier of fact. A leave of absence to seek treatment cannot be required as a matter of law, or *Phillips* would have turned out the other way. (In *Phillips*, the City of Seattle's refusal to allow an alcoholic to take a leave of absence to undergo a treatment program was found to be reasonable.)

The Appeals Court's Opinion also, correctly, recognizes that in some circumstances remarks in an oral opinion from the bench may supplement the formal findings of fact entered later. However, in concluding that the trial court had in effect made a finding that granting a leave of absence would have been a reasonable accommodation, the court went beyond accepted limits for reliance upon informal remarks of a trial judge, possibly because the Appeals Court misapprehended in two critical respects what happened in the litigation at the trial court level.

First, the Appeals Court incorrectly assumed that "throughout this proceeding, Plaintiff has maintained that ARCO could have reasonably accommodated his disability. . . by granting a leave of absence in June, 1981 to provide him with an opportunity to make it through the 1981 episode of cluster migraines and to seek long-term effective treatment for his migraine condition." Plaintiff at no point in the litigation — until his proposed findings presented subsequent to the court's oral remarks — claimed that a leave of absence to allow his headache episodes to pass or to obtain treatment was an accommodation that should have been made. Nor did he request one while he was employed. This may explain the District Court's refusal to make such a finding — the issue of a leave of absence was never really litigated.

Second, the 9th Circuit's Opinion is based upon a belief that the trial court made an oral finding, characterized by the 9th Circuit as consistent with her subsequent formal findings, that granting a leave of absence in 1981 would have been a reasonable accommodation. As explained above, this is a critical misapprehension,. And its significance is compounded because the trial court's remarks, which are now treated as a "finding," were made without the benefit of *Phillips v. Seattle, supra*, which was decided after the trial in this case (during pendency of Plaintiff's appeal). *Phillips* would have informed the judge that it is reasonable to *refuse* a leave of absence, even where it has been requested (which was not done here) for a proven treatment program (which did not exist here).

The court's Opinion apparently misperceived ARCO's position, stating 889 F.2d (at p. 878) a belief that ". . . ARCO does not take exception to this finding" (that a leave of absence would have been a reasonable accommodation). Actually, ARCO would strenuously disagree with such a finding. However ARCO's disagreement with the Court's assertion is more fundamental: This was never a finding of the trial court to begin with.

The rule in the 9th Circuit on use of a District Court's oral opinion to supplement findings, is that oral remarks which do not end up in the formal findings signed by the court, may be deemed part of the court's findings only where the remark in question is a direct and clear finding, which is totally consistent with the court's formal findings, thus serving merely to supplement them. *Southern Pacific Land Company v. United States*, 367 F.2d 161, 162 n.1 (9th Cir. 1966), *cert. denied*, 386 U.S. 1030, 18 L. Ed. 2d 592, 87 S. Ct. 1478 (1967). However, such oral statements may not be borrowed as "findings" if subsequently the court makes formal findings, where there is any inconsistency. *Ohlinger v. U.S.*, 219 F.2d 310, 311 (9th Cir. 1955).

Even in the 9th Circuit, prior cases (often relying on the governing Supreme Court case, *Stone v. United States*, 164 U.S. 380, 383, 17 S. Ct. 71, 41 L. Ed. 477 (1896)), forbid resort to oral remarks for a phantom fact-finding under these circumstances. *E.g., Mayview Corporation v. Rodstein*, 620 F.2d 1347, 1358 n.10 (9th Cir. 1980). Creating a fact-finding which the trial judge specifically refused to make, from off-hand oral remarks at the conclusion of the trial, which are so inconsistent with the trial court's judgment as to cause a reversal, rather than at the very least remanding the case to the trial court for a specific finding on the point, is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision in order to correct the situation. Supreme Court Rule 10.

Because the trial judge actually found (though expressing it as a conclusion of law) that ARCO did not fail to make any legally required accommodations, the trial court's judgment should have been affirmed, not reversed. This is so because under *Phillips*, the determination as to whether an accommodation is reasonable is a question for the trial court, and the trial court determined that ARCO had not failed to make any required (*i.e.*, reasonable) accommodation. Conclusion of Law No. 3. At the very least the case should have been remanded, not reversed, for an assessment by the trial court, in light of the *Phillips* case, of the question whether a leave of absence was required as a reasonable accommodation, and a clear finding of fact on that point should thus have been made by the trial judge. As it stands, in effect, impermissible fact-finding at the appellate level once again occurred in the 9th Circuit. *See Icicle Seafoods v. Worthington*, 475 U.S. 709, 89 L. Ed. 2d 739, 106 S. Ct. 1527, 1530 (1986).[1]

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[1] In *Icicle* the Court of Appeals substituted its own fact-finding by failing to observe the correct standard of review. In this case, the court claims to defer to a fact-finding attributed to but never made by the trial court. The effect is the same.

PRAYER FOR REVIEW

Accordingly, Petitioner seeks review on writ of certiorari, on grounds that the Ninth Circuit Court of Appeals has gone far beyond the accepted limits for using oral remarks of a trial judge by creating a "fact-finding" never made in order to reverse the judge's decision. Upon review this Court should uphold the District Court's judgment, based on the trial judge's conclusion that ARCO did not fail to make any legally required reasonable accommodation. Alternatively, the case should be remanded to the trial court to make a finding, one way or the other, on whether a leave of absence is a required reasonable accommodation under the circumstances, in light of *Phillips v. Seattle.*

Respectfully submitted this 15th day of May, 1990.

GRAHAM & DUNN
Clemens H. Barnes
Attorneys for Petitioner

APPENDIX A

AFTERNOON SESSION

(1:30 p.m., March 4, 1987)

THE COURT: Well, I determined you would rather have a short decision today than you would like to have a long, polished memorandum sometime in the future.

There has been a lot of testimony these last few days, and it's easy for a judge or anyone to be sympathetic toward an employee who has been treated shabbily, in my opinon. On the other hand, the issue is can they do it under the law. Apparently they can.

I would have to hold for the defendant on all claims made by the plaintiff. I want to compliment the attorneys. They have certainly done their best. They had sincere feelings in the rights of their client, and they should have, and the plaintiff has had the best representation possible. This case was almost determined on a summary judgment but I had to find out what the employee's — what their expectation was in view of the *St. Regis* issue.

Dealing with the handicap first, the tragedy in this case really is that neither the plaintiff nor ARCO saw Kimbro as being handicapped. He didn't make it clear to them that he was handicapped. They looked at his record for the last three years and would have no reason to believe that his migraine headaches were causing him the problem. He had four sick days in 1981, as I recall his headaches, none in '79, none in '80, and in '81, four days. He had a variety of other absences in those days.

Plaintiff makes a compelling argument in retrospect, and in my opinion cluster migraines can be and are a handicap. But really, whose responsibility is it to establish that handicap

to allow ARCO to determine whether they can or cannot make accommodations. In my opinion they could make accommodations, reasonable accommodations, which they did in the past. When he had a series of cluster mgiraines before, Jackson told him "You don't have to keep calling in or waking yourself up every day to call in and say you've got a headache and can't come to work."

They could have accommodated him by allowing him to use sick leave, had he asked for it; given him a leave of absence, had he asked for it. I think it would be unreasonable to say they had to accommodate him on an hourly tardiness basis. That's no way to run a refinery or a machine shop in a refinery. They cannot be expected to accommodate erratic attendance hourly.

But if a handicap is established which is, as his was, in remission for years on end, and it takes two or three months, or whatever, that could be accommodated. But as we see in the *Reese* case, they came forward with medical evidence. They asked that he be allowed to wear a gas mask or to have light duty. We have none of that testimony in this case. We have, unfortunately, Kimbro thinking that he could manage it and telling Jackson "I've got it under control. I'm taking medication and I can do the job. I can manage it. I'm just having trouble waking up."

Now, whose responsibility is it to see that Kimbro gets to work? Should the employer have to call him? If a telephone call would wake him up by one of his fellow workers, couldn't he have arranged to have a wakeup call somewhere, some time every day, if necessary? Couldn't he have arranged to have two or three or four or five alarm clocks?

I think he was managing it but I think he just fell down toward the end. He got the warning letters and three absences later, three lates later, he was fired, and in none of that time

did he tell anybody but Jackson that he was having headaches and medication was preventing him from getting to work. Jackson reportedly told his bosses that there was a problem; that he was taking medication, but when you look at the record over the last three years that they looked at, they did not see any one single problem that would indicate to them a handicap.

Handicap aside, we have then what are you going to do about the sick leave? What are the reasonable expectations? What has ARCO promised somebody when they are employed, when they come to be hired? We have a terminable at will contract. The Supreme Court of the state of Washington says you may not be able to terminate at will. If you've promised employees other things, you may be stuck with your promise.

So what were the expectations? I was interested in all the employees who came forward in what their expectations were, including Kimbro and what his understanding was. He indicated it had been discussed. He didn't pay too much attention to it when he went in, but it was a liberal sick leave program. You've got Cranford who said they could get terminated for too much time off. You've got McKay who said they always knew you could be disciplined for excessive absences, even if you had sick leave left in your bank. You've got Froneberger when he was hired. He(was)told that sick leave was designed for long illnesses or heart attack. You've got Wren who knew you could be disciplined for using sick leave in the beginning.

Apparently ARCO has always treated attendance and sick leave as two separate issues, when they're discussing the benefits and when they're discussing the employees' responsibility to the company. It is my personal opinion, even though the plaintiffs are indicating, well, yeah, now everybody knows they're going to get it if you use too much of your sick leave. In my opinion, ARCO ought to make that a little clearer in writing in the employee's handbook. It's fine for

the supervisors to know that and it's fine for word of mouth to get around and tell them that, but there is nothing like having it in writing and saying "Our sick leave is for long-term disabilities; it's for specific incidents; it's for maternity leave, but if you use too much of the short-term intermittently, we're not going to keep you because we don't want to run our business that way."

The courts really can't tell private business who they have to maintain. If they happen to have a union free shop, which they do, and they happen to place attendance at the top of their line, they can do so, unless it violates public policy.

Now, were this a case where Kimbro was halfway through a serious illness and had sick leave left in the bank and they fired him, for instance, a heart condition or cancer or some of the catastrophic illnesses we think about, that would be against public policy and they would not have been allowed to violate their sick leave policy. But taking the total situation, as I see it, there is nothing legally that can prevent ARCO from firing Kimbro or others like him in the manner they did.

For that reason, I will dismiss the case and hold in favor of the defendant, with regret. I think you should tell ARCO that they treated him shabbily and they should tighten it up in the future. It's easy for the supervisors to know it but it's one thing the employees should all be well aware of as well.

Do you want to prepare some findings?

MR. BARNES: Yes, I will.

THE COURT: And then give them to counsel to critique or prepare her own as well.

MR. BARNES: Yes, ma'am.

(Court adjourned.)

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DANIEL KIMBRO, Plaintiff, v. ATLANTIC RICHFIELD COMPANY, INC., Defendant.	No. C84-656D ORDER

This case came on for trial commencing February 24, 1987, before the undersigned United States District Court Judge. Upon consideration of all the evidence, briefs and arguments, and having rendered its oral opinon on March 4, 1987, the Court now makes and enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Defendant Atlantic Richfield Company ("ARCO") has operated an oil refinery at Cherry Point near Ferndale, Washington, since it was built in 1971. Plaintiff Daniel Kimbro was employed there as a machinist from April 1971 until he was discharged in June 1981.

2. ARCO employs approximately 420 employees at the refinery, 190 in the maintenance department, including 22 machinists.

3. Throughout his employment at the refinery Kimbro's performance appraisals were generally good to excellent, and defendant considered his work satisfactory. However, plaintiff was terminated on June 10, 1981. The stated reason for his termination was an unsatisfactory attendance record of excessive absenteeism and tardiness, including both the total hours of such absences or tardies and the number of such incidents.

4. Since it was established in 1971, ARCO's Cherry Point refinery has maintained an articulated personnel policy favoring the economy and efficiency of a non-union environment. Called the "Union-Free Environment Policy," this policy states the goals of acquiring and retaining employees on a long-term basis, and persuading them to refrain from electing a union to represent them, by offering wages and benefits comparable to those offered by unionized oil refineries. ARCO's Cherry Point refinery offers liberal wages and benefits which increase with length of employment. Among the benefits offered are a sick leave plan, two disability plans, a retirement plan, various types of unpaid leaves of absence, and other benefit plans not directly at issue here.

5. One of ARCO's benefit policies is its Sick Leave Plan, admitted at trial as Exhibit 13. The written Sick Leave Plan description is distributed and explained to employees at orientation, and updates are mailed to their homes from time to time. Like all ARCO employees, Kimbro received given copies of the Sick Leave Plan. Under the Sick Leave Plan, an employee's salary is paid (in full or partly) for days that he is sick and therefore absent from work, provided he has sick pay allowance remaining in his account. Under this plan, if a worker is absent because of an illness or injury, then his salary (or, after a point, half his salary) will be continued while he is unable to work until he uses up his salary continuation allowance. However, ARCO does not interpret the plan as preventing termination of a worker who is sick or injured too

frequently and replacing him with a more dependable worker, even though the illness- or injury-prone employee has not yet exhausted his sick pay benefits, although this interpretation is not written in any employee policy manuals.

6. ARCO maintains a written policy describing its attendance requirements (Exhibits 16 and 17). This policy requires that employees whose attendance is considered unsatisfactory receive informal counseling from their supervisors as a first step; counseling with a memorandum to the file as a second step; and final warning as a third step prior to discharge. These procedures were followed in Kimbro's case.

7. The written attendance policy is contained in a supervisor's manual distributed to supervisors for their use in administering policy. While employees are permitted to review the supervisor's manual if they request to do so, the manual is not distributed to employees.

8. ARCO's attendance policy sets forth an attendance goal which includes substantially fewer days absent from work than the sick leave benefits which would accrue to a 10-year employee like Kimbro. Beginning in 1980, ARCO began to scrutinize employee attendance more closely in an attempt to minimize absenteeism. It also began to discipline employees whose absences exceeded the goal of 3 percent.

9. ARCO's employees are generally aware that, under ARCO's attendance control policies, they are subject to discipline, including loss of their jobs, for missing too much work too often, even for legitimate sickness and even though their maximum sick pay allowance has not been exhausted. This was or should have been generally understood prior to plaintiff's discipline and eventual discharge. Plaintiff was or should have been aware he could be disciplined, and eventually dismissed, for absences or tardiness even if sick-related and paid as "sick leave" without challenge.

10. Plaintiff suffers from a condition diagnosed as "cluster" migraine. Cluster migraine headaches are characterized by acute episodes of migraine, lasting for periods of up to an hour and occurring in clusters of several per day over a period of several weeks or months. During an acute episode, Kimbro is unable to work, sleep or perform any meaningful task. Between clusters (which can be months or even years apart), and between acute phases within a cluster period; normal activity is unimpaired. Acute episodes are generally unpredictable as to when they will occur. Nocturnal acute episodes, and the medication Kimbro took to decrease their effects, affected Kimbro's sleep patterns and made it more difficult for him to awaken.

11. Kimbro's clusters of acute episodes began in late 1976, ended in 1977, and recurred in 1981 prior to his discharge. Acute episodes also occurred occasionally, though not in clusters of months or weeks, between 1976 and 1980.

12. Kimbro's acute episodes were evident to those who had contact with him while they were occurring. When an acute episode occurred while Kimbro was at work, his supervisor Jack Jackson allowed him to stop working and rest or visit the company's medical office until the episode had subsided.

13. Between 1977 and 1981, Kimbro experienced recurrences of the cluster migraine headaches and pain resulting from a back injury and surgery in 1977. While both conditions impeded him from working at various times during his employment, neither was disabling to the degree that made Kimbro unable to work. Instead, they would require him to miss only several hours or several days of work sporadically.

14. During his employment, Kimbro also missed work on many occasions for reasons unrelated to either condition, including an ankle injury in 1980, the flu and colds, and personal business.

15. Kimbro's supervisor maintained an attendance log on which was recorded the absences of employees and the reasons for those absences. Exhibit 9 at trial.

16. Following his severe headaches in 1976, and his back surgery in 1977, plaintiff returned to work with notes from his doctors indicating that he was medically able to work without restrictions. Although aware of his past history of headaches and back surgery, ARCO management did not then regard plaintiff's back or headaches as serious current medical impairments, and had not been informed that plaintiff's illnesses were a result of any particular medical impairments.

17. ARCO did not regard plaintiff's back injury in 1977 as occupational (that is, occurring on the job), and did not knowingly treat an occupational injury to plaintiff as though it were non-occupational.

18. ARCO did not suspect or allege that any of Kimbro's absences, which included sick leave and unpaid personal business (requiring prior authorization by the immediate supervisor) involved misconduct or other failure to satisfy its requirements for use of the leave time involved. Rather, ARCO's position was that regardless of the legitimacy of his absences, Kimbro's attendance was unsatisfactory and justified his termination.

19. At the time of his termination, Kimbro's unused sick leave allowance was 10 weeks of full salary and at least 36 weeks of half salary. Consistent with the terms of the policy, he was not paid for the sick leave remaining when he was discharged.

20. Throughout Kimbro's employment and continuing to date, ARCO's personnel policies, including those related to attendance, are administered through its working supervisors. ARCO's personnel administration policies require employees

to bring scheduling problems, requests for time off, inquiries about policies and benefits, and other personnel-related matters to their supervisors. The supervisor is directly responsible for counseling employees, reprimanding them or invoking other discipline as appropriate or as recommended by ARCO's Employee Relations Department staff. Kimbro's supervisor throughout his employment was Jack Jackson.

21. Kimbro received an oral reprimand in February 1979, because his attendance record was unsatisfactory. In August 1980, a check of employee attendance statistics, performed routinely by Employee Relations representative Ralph Sisco, indicated that Kimbro's absences had exceeded 3 percent, the refinery goal at the time. Sisco wrote a memorandum to Kimbro's supervisor Jackson on August 15, 1980, instructing him to advise Kimbro that his attendance record was unsatisfactory and must be improved. Kimbro met with Jackson on or about August 19 and discussed his absences. Sisco's memorandum was placed in Kimbro's file and the refinery Employee Relations Department began to monitor his attendance, in accordance with the attendance policy.

22. In early 1981, Kimbro's cluster migraine condition began to recur. He was absent several times as a result, each time using sick leave, although he was also absent for reasons unrelated to his headaches during that period.

23. In March 1981, Kimbro's superiors met to discuss his attendance. Present at the meeting were the responsible Employee Relations Representative (Ralph Sisco); the Manager of the Maintenance Department (Ray Snover); Jack Jackson, Kimbro's supervisor; and Norm Lynch, Jackson's immediate supervisor. Kimbro's records from the refinery medical office were not obtained or reviewed, and ARCO's procedures which allow it to demand medical information from employees were not invoked, as ARCO generally does not review medical

records in connection with discipline or discharge of employees. As a result of this meeting, Kimbro received a letter giving him "final warning" that excessive absenteeism would result in discharge (Exhibit 6). He was also advised by his supervisor orally that if he were tardy or absent again he would be discharged.

24. On occasion, when supervisor Jackson counseled with and warned Kimbro about his absences, Kimbro's headache problem was mentioned. Kimbro indicated at those times that he was trying to manage his migraine headaches. He did not demand to use sick leave.

25. Kimbro did not seek or inquire about a leave of absence; the accommodation he sought on occasions, after being absent from work, was to be allowed to make up time after hours or on the weekend.

26. Although Kimbro's supervisor, Jack Jackson, was aware that Kimbro occasionally experienced severe headaches, ARCO's management personnel who made the decision to terminate Kimbro were not. No ARCO management people knew that the migraine condition was a handicap.

27. Kimbro was tardy three times after the final warning in March, each time because the wake-up call system he had devised with another employee failed when he overslept.

28. On the third occasion, June 10, 1981, Kimbro was terminated because of his undependability in terms of attendance and punctuality, having demonstrated an unsatisfactory attendance record which, despite counseling that improvement was needed, was not corrected.

29. Dependable attendance among ARCO's machinists is essential in order to plan and perform the work schedule. When plaintiff would not show up or not show up on time, his

supervisors would have to reevaluate how they could cover the work tasks which had been scheduled counting upon plaintiff, and decide which tasks could be left undone and postponed.

30. Machinists' work projects for the next day are tentatively scheduled at the end of the previous workday. Where an emergency during the night has changed project priorities, the work schedule is adjusted early in the morning by the foremen or shop supervisor, who arrive at 6 a.m. or earlier. The work crews are lined up and assigned to the scheduled projects by the foremen or shop supervisor before the machinists report at 6:30 a.m. Jobs are scheduled and crews of machinists are lined up before the machinists arrive, because the operators of the refinery have to be informed in advance of which equipment to get prepared for machinists to work on that day. The "operations" side of the refinery needs to know in advance which pieces of equipment will be shut down for repair by the machinists, and therefore out of action in the production process. To work around the pieces of equipment scheduled to be repaired by the machinists, the operators reroute the product flow around the equipment scheduled for repair. Some equipment which handles "hot product," such as pumps, can take as long as four hours to cool down so machinists can work on them. Because the production process is planned around the maintenance and repair schedule established in advance, it is important to have a dependable crew of machinists who can be counted upon to arrive at work on a regular basis, on time, to avoid delay or postponement of maintenance projects which have been coordinated in advance with "operations" personnel.

31. Machinists at the refinery at plaintiff's level have several years of formal training; no temporary "manpower" pool exists for temporary replacement refinery machinists.

32. Generally machinists work in teams; however, there are a limited number of tasks performed by one individual. Sometimes, a job is available which an individual worker could stay late to accomplish. However, generally it was not considered desirable that machinists be left working alone in the machine shop, for safety reasons. While tasks not performed in teams did exist, mainly such duties were "fill-in" assignments between projects for machinists. They were not the full-time, regular assignment of any machinist.

33. If "one man" jobs of that nature were to be combined into a job which plaintiff could perform, unsupervised, when and as he was available to work (and when and as such work was available), a replacement for plaintiff's regular machinist position would be required.

34. Kimbro was not terminated to prevent his use of company disability benefits, or in retaliation for prior use of company disability benefits.

35. At the time he was terminated, Kimbro's fringe benefits were reviewed with him by Employee Relations supervisor Ralph Sisco. Sisco did not consider Kimbro "disabled," so as to qualify for either long-term disability or disability retirement benefits. Thus, Sisco did not discuss with Kimbro whether he was or was not qualified for disability benefits, except to advise Kimbro that he did not meet length of service requirements for disability retirement and to tell him that his coverage under the long-term disability plan would expire at the end of the month.

36. Employees, including Kimbro, are provided Summary Plan Descriptions outlining fringe benefits available to them as ARCO employees, including long-term disability and disability retirement benefits, as well as sick leave and other allowances. Kimbro had never read the Summary Plan Description outlining ARCO's disability benefits, and never submitted

a claim for disability benefits, or asked for further information from ARCO about how to seek such benefits.

37. The stated reasons for Kimbro's termination were the reasons motivating those who made the decision, rather than a pretext for an effort to deprive him of employee benefits to which he was or might become entitled.

CONCLUSIONS OF LAW

1. Jurisdiction is vested in this Court by virtue of 28 U.S.C. § 1332 (diversity of citizenship and amount in controversy), and under 28 U.S.C. § 1331 (as an action under federal statute, ERISA) and 29 U.S.C. § 1132 (ERISA's jurisdiction provision). Plaintiff is a Washington resident and defendant is a foreign (Pennsylvania) corporation with its principal place of business in California. In this action damages in excess of $10,000 are sought. The Court also has pendent jurisdiction over state law claims alleged in the pleadings.

2. Plaintiff's "cluster migraine" condition is a "handicap" within the meaning of the state law against discrimination, RCW 49.60.

3. ARCO did not terminate or unlawfully discriminate against plaintiff because of a handicap, in violation of the state Law Against Discrimination, nor fail to make a legally required accommodation for plaintiff's handicaps. Furthermore, Kimbro had a duty to advise ARCO management and his supervisor's superiors of his handicap and the accommodation he needed from ARCO. While his supervisor knew generally that Kimbro occasionally experienced severe headaches, Kimbro should have realized that the supervisor's superiors did not know, and should have advised them himself. Because ARCO management did not know of Kimbro's handicap, its discharge of him without making reasonable accommodation of the handicap did not violate the Law Against Discrimination, RCW 49.60.

4. Plaintiff's employment was terminable without cause ("at will"); however, even if "cause" for plaintiff's discharge was required, plaintiff's undependable attendance and punctuality was sufficient "cause" for his termination.

5. Plaintiff was not disciplined or discharged in violation of his employment contract or employment policies binding upon ARCO. Under ARCO's sick leave and attendance control policies, as interpreted by ARCO and understood by most employees, employees could be terminated for undependability in attendance even though work was missed for legitimate illnesses or injuries covered by "sick leave" pay, and even though their maximum allowance of "sick leave" pay had not been exhausted.

6. Plaintiff was not terminated to prevent his use of company benefits, or in retaliation for prior use of company benefits, in violation of ERISA.

7. Defendant did not violate ERISA by failing to inform plaintiff about, or assist him to obtain, disability, sick pay or other benefits protected by ERISA. While it may have been desirable to encourage or assist plaintiff in seeking disability or other benefits, ERISA's requirements to provide information to plaintiff about ARCO's employee benefit plans were met. No legal requirements for providing information or assistance about such benefits were unsatisfied.

8. Plaintiff's discipline and discharge did not constitute the tort of wrongful discharge under Washington State law.

9. Plaintiff's action should be dismissed.

The Clerk of the Court shall enter judgment accordingly.

DATED this 22nd day of May, 1987.

CAROLYN R. DIMMICK
United States District Judge

APPENDIX C

SPECIAL EARTHQUAKE NOTICE

This opinion is being filed while the Clerk's office in San Francisco is closed due to severe earthquake damage. Once the Clerk's office is operational, notices will be placed in legal newspapers throughout the Circuit. At that time parties may seek additional time to file a petition for rehearing if they desire to file one.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DANIEL KIMBRO, *Plaintiff-Appellant/ Cross-Appellee.* v. ATLANTIC RICHFIELD COMPANY, *Defendant-Appellee/ Cross-Appellant.*	Nos. 87-3903 87-4007 D.C. No. CV-84-656-D OPINION

Appeal from the United States District Court
for the Western District of Washington
Carolyn R. Dimmick, District Judge, Presiding

Argued and Submitted
May 1, 1989—Seattle, Washington

Filed November 14, 1989

Before: Arthur L. Alarcon, Warren J. Ferguson and David R. Thompson, Circuit Judges.

Opinion by Judge Ferguson

SUMMARY

Employment Discrimination/Contracts/Pensions

Affirming in part and reversing in part a judgment of the district court, the court held that under Washington's antidiscrimination law, an employer, on notice about an employee's disability, should be held responsible for failure to make a reasonable accommodation for the employee's handicap.

Appellant Daniel Kimbro, hired as a machinist by appellee Atlantic Richfield Company in 1971 to work in the Cherry Point, Washington, oil refinery, maintained a satisfactory attendance record for his first five years. However, in 1976, Kimbro was diagnosed as suffering from cluster migraine, a condition characterized by sporadic and debilitating migraines during which Kimbro is unable to work, sleep or perform any meaningful task. Between clusters, which can be months or years apart, normal activity is unimpaired. Between the time he began taking medication and receiving treatment in 1976 and 1981 when he was terminated, Kimbro was reprimanded by his supervisor, Jack Jackson, because his attendance record was unsatisfactory. After his third late arrival at work, Kimbro was discharged for excessive absenteeism. At the time of his discharge, Kimbro carried an unexhausted sick leave equivalent to ten weeks of full salary and at least 36 weeks of half salary. Kimbro brought action against ARCO alleging handicap discrimination, breach of contract, and violations of the Employee Retirement Income Security Act, 29 U.S.C. § 1140. Kimbro also contended that ARCO failed to make reasonable accommodations to his physical impairments and thus violated Washington's statutory provision forbidding discrimination against the disabled in the workplace. Kimbro appealed the district court's ruling in favor of ARCO.

[1] Since the record strongly suggests that Kimbro's attendance record would not have been substandard but for his migraine-related headaches and [2] since he had been diagnosed as having a well known medical condition, Kimbro clearly was handicapped under the Washington antidiscrimination law. [3] The district court reasoned that because ARCO management did not have sufficient knowledge of Kimbro's migraine condition, ARCO could not be held responsible for any failure to attempt a reasonable accommodation. [4] The record demonstrates, however, that Kimbro's supervisor, Jackson, was fully aware of the fact that Kimbro's headaches were a manifestation of a serious medical condition. Kimbro frequently discussed his condition with Jackson, Jackson knew Kimbro was receiving medication and treatment, and Jackson personally witnessed the debilitating effects of the headaches. [5] Under Washington law, the principal is chargeable with and bound by the knowledge of or notice to his agent received while the agent is acting as such within the scope of his authority and in reference to a matter over which his authority extends. [6] Traditional agency principles are fully applicable in the employment context. [7] The district court explicitly found that ARCO's personnel policies, including those related to attendance, are administered through its working supervisors. [8] Since Jackson clearly acquired knowledge of Kimbro's migraine condition in his supervisory position and had a duty to communicate such knowledge to management, ARCO, as a matter of law, was on notice of Kimbro's migraine condition. ARCO should be held responsible for any failure to make a reasonable accommodation.

[9] Kimbro contended that ARCO could have reasonably accommodated his disability by allowing him to use his accumulated sick leave when he was prevented from working, by allowing him to work after normal hours to compensate for time missed, or by granting him a leave of absence during his 1981 migraine episodes so that he might seek long-term effective treatment for his condition. [10] The court found clear

support in the record for the district court's finding that the first two proposed accommodations would have imposed an undue hardship on ARCO. However, the district court found that granting a leave of absence would have been a reasonable accommodation. [11] It was clearly possible that a leave of absence in 1981 would have provided Kimbro with an opportunity to endure the acute episodes and then return to work unimpaired for the foreseeable future. Also, it would have given Kimbro and his physicians an opportunity to design an effective treatment program.

[12] Kimbro's breach of contract claim failed because [13] his evidence at trial failed to meet the evidentiary burden of showing that his interpretation of ARCO's sick leave plan actually induced him to remain as a machinist at ARCO. He failed to show the requisite degree of reliance.

[14] Section 510 of ERISA prohibits an employer from taking any adverse employment action against an employee for exercising any right to which he is entitled under the provisions of an employee benefit plan. [15] Kimbro, however, failed to adduce at trial any evidence from which one could reasonably infer that his discharge was in reprisal for his prior use of sick leave benefits.

COUNSEL

Deborra E. Garrett, Raas, Johnsen, Garrett & Stuen, Bellingham, Washington, for the plaintiff-appellant/cross-appellee.

Clemens H. Barnes, Graham & Dunn, Seattle, Washington, for the defendant-appellee/cross-appellant.

OPINION

FERGUSON, Circuit Judge:

Appellant Daniel Kimbro appeals the district court's judgment in favor of Atlantic Richfield (ARCO) in his action alleging handicap discrimination, breach of contract, and violations of the Employee Retirement Income Security Act (ERISA). Kimbro, a machinist at an ARCO refinery, was discharged after ten years of employment with the company for excessive absenteeism and tardiness. Kimbro contends that ARCO failed to make reasonable accommodations to his physical impairments and thus violated Washington's statutory provision forbidding discrimination against the disabled in the workplace. He also claims that ARCO breached their employment contract by discharging him before he had an opportunity to use all of his sick leave benefits, and by not considering the proper factors in its decision to terminate him. Finally, Kimbro alleges that his discharge was in retaliation for his past use of ERISA-protected employee sick leave benefits. ARCO appeals the district court's denial of its request for attorneys' fees. We affirm in part and reverse in part.

I.

Plaintiff Daniel Kimbro was hired as a machinist by ARCO in 1971 to work in the Cherry Point, Washington, oil refinery. Since beginning operations in 1971, ARCO's Cherry Point refinery has maintained a personnel policy self-described as a "union-free environment policy." Pursuant to this policy, ARCO offers wages and benefits comparable to those offered at unionized oil refineries in an effort to maintain a loyal group of employees who feel no need to elect a union to represent their interests. Among these benefits are a sick leave plan [hereinafter Sick Leave Plan], two disability plans, a retirement plan, and various types of unpaid leaves of absence. The Sick Leave Plan, which is relevant to this litigation, allows a

worker to collect his salary during absences attributable to non-occupational illness or injury.[1]

ARCO also maintains a written policy describing its attendance requirements. ARCO's attendance policy sets forth an attendance goal which includes substantially fewer days absence from work than the number of sick leave days which would accrue to a 10-year employee. This policy requires ARCO to follow a three-step process before discharging an employee for unsatisfactory attendance. As a first step, the employee is to receive informal counseling from his immediate supervisor. If attendance continues to be a problem, the policy calls on the supervisor to provide additional counseling and to place a written memorandum in the employee's file. The policy requires ARCO to issue a final warning before discharging an employee for attendance problems.

Kimbro maintained a satisfactory attendance record during his first five years at ARCO. Although Kimbro missed intermittent days for various illnesses and used sick leave days for those absences, he had no major illness or injury which required him to miss work over an extended period. In 1976, however, Kimbro was diagnosed as suffering from a condition known as "cluster migraine." This condition is characterized by sporadic and debilitating episodes of migraines. Each migraine lasts up to an hour and the headaches occur in clusters of several per day over a period of weeks or months. During acute episodes, Kimbro is unable to work, sleep, or perform any meaningful task. Between clusters, which can be months or even years apart, normal activity is unimpaired. Kimbro began taking medication and receiving treatment for his condition in 1976. He missed several weeks of work in late 1976 as a result of cluster migraines.

[1] Benefits under the Sick Leave Plan will hereinafter be referred to as sick leave days.

Kimbro also missed a substantial amount of work between 1977 and 1980, primarily as a result of back surgery in 1977. While Kimbro experienced some occasional migraines during this period, he was forced to miss work only a few times on account of his migraine condition.

In 1979, Kimbro received an oral reprimand from his supervisor, Jack Jackson, because his attendance record was unsatisfactory. In August 1980, in accordance with the attendance policy, Jackson counseled Kimbro again on his poor attendance and placed a memorandum in Kimbro's personnel file.

In early 1981, Kimbro's cluster migraine condition recurred. As a result, he was absent and tardy several times during this period. He was also absent twice for other non-migraine related illness during early 1981. In March 1981, ARCO issued a final warning to Kimbro regarding his poor attendance. He was warned that he would be discharged if he were tardy or absent again in the foreseeable future. Kimbro was tardy as a result of his migraine condition three times after receiving this final warning. On June 10, the date of his third late arrival to work, Kimbro was discharged for excessive absenteeism.

At the time of his discharge, Kimbro carried an unexhausted sick leave equivalent to ten weeks of full salary and at least 36 weeks of half salary. While Kimbro used his sick leave days intermittently on the days he was absent from work because of a migraine or other illness, and occasionally compensated for hours missed on those days he arrived late to work by staying after regular operating hours to perform repair work, he did not formally request that he be permitted to continue either of these practices as an alternative to discharge. Nor did he request that any other accommodation be made to his migraine condition upon receiving either the final warning or the final termination notice.

Kimbro continued to experience acute cluster migraines after his discharge from ARCO and continued to seek treatment and medication for his condition. In late 1985, however, he began to receive treatment from a psychologist which enables him to exert some control over his migraines. He claims that this current treatment allows him to work full-time without substantial interference.

Kimbro filed this action against ARCO in February 1986, alleging, among other things, that ARCO (1) violated Washington's law against discrimination, Wash. Rev. Code § 49.60, by failing to attempt a reasonable accommodation to his migraine condition, that it (2) breached its employment contract with Kimbro, and (3) violated ERISA, 29 U.S.C. § 1140, by discharging him in retaliation for use of his federally-protected benefits.[2] The district court held a bench trial and rendered judgment in favor of ARCO on all claims. It denied, however, ARCO's request for attorneys' fees under ERISA, 29 U.S.C. § 1132(g).

II.

A district court's findings of fact are reviewed under the clearly erroneous standard. *LaDuke v. Nelson*, 762 F.2d 1318, 1321 (9th Cir. 1985); Fed. R. Civ. P. 52(a). Questions of law are, of course, reviewed *de novo*. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 105 S. Ct. 101 (1984). A district court's interpretation of state law is reviewed under the same independent *de novo* standard as are questions of federal law. *Matter of McKinn*, 739 F.2d 1395, 1397 (9th Cir. 1984) (en banc).

[2]Kimbro also alleged in his lawsuit that ARCO violated ERISA, 29 U.S.C. § 1022, by failing to inform him about or assist him in obtaining ERISA-protected benefits. The district court found in favor of ARCO on this issue as well. Kimbro has abandoned this claim on appeal.

III.

In recognition of the significant impediments that confront the disabled in the workplace, the Washington legislature amended the state's employment discrimination law in 1973 to include a prohibition against discrimination based on physical, mental or sensory handicaps. *See* Wash. Rev. Code § 49.60.180.[3] The Washington Supreme Court has held that an employer commits an unfair employment practice under § 49.60.180 when it discharges an employee without attempting to make reasonable accommodations to the employee's physical, mental, or sensory limitations. *Reese v. Sears Roebuck & Co.*, 107 Wash.2d 563, 578-80, 731 P.2d 497, 506 (1987); *Dean v. Municipality of Metropolitan*, 104 Wash.2d 627, 632-33, 708 P.2d 393, 396-400 (1985); *Holland v. Boeing*, 90 Wash.2d 384, 389, 583 P.2d 621, 623-24 (1985); Wash. Admin. Code § 162-22-080(1).

Kimbro contends that ARCO's failure to attempt to reasonably accommodate his migraine condition prior to dis-

[3]It is an unfair practice for an employer:

(1) To refuse to hire any person because of such person's age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap, unless bases upon a bona fide occupational qualification: *Provided*, That the prohibition against discrimination because of such handicap shall not apply if the particular disability prevents the proper performance of the particular worker involved.

(2) To discharge or bar any person from employment because of such person's age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of such person's age, sex, marital status, race, creed, color, or the presence of any sensory, mental, or physical handicap.

Id. (emphasis in original).

charge constitutes a breach of ARCO's statutory duty under Washington's handicap discrimination law. The district court found that while Kimbro's condition indeed qualified as a handicap under Washington law, ARCO could not be held liable for failing to attempt a reasonable accommodation since the ARCO management personnel who made the decision to terminate Kimbro were not personally aware that many of Kimbro's absences throughout his period of employment, including those immediately prior to his discharge in 1981, were attributable to his cluster migraine condition. Thus, the district court concluded that the ARCO management's lack of personal knowledge precluded the imposition of liability on ARCO for failing to make a reasonable accommodation.

While we find no error in the district court's finding that Kimbro suffered from a handicap within the meaning of Wash. Rev. Code § 49.60.180, we believe that the district court erred in finding that ARCO management's lack of personal knowledge of Kimbro's migraine condition insulates the company from liability; ARCO was in fact on notice of Kimbro's condition as a result of Kimbro's supervisor's full awareness of his condition and thus must be held responsible for any failure to attempt a reasonable accommodation. Since the district court's findings and the record demonstrate that ARCO could have attempted a reasonable accommodation of Kimbro's condition but failed to do so, ARCO's conduct in this case constitutes an unfair employment practice under Washington's statutory prohibition against handicap discrimination.

A.

As an initial matter, we note that the district court clearly did not err in finding that Kimbro's cluster migraine condition constituted a handicap within the meaning of Wash. Rev. Code § 49.60.180. In *Phillips v. City of Seattle*, 111 Wash.2d 903, 766 P.2d 1099, 1101-02 (1989), the Supreme

Court of Washington adopted Wash. Admin. Code § 162-22-040 as the applicable definition for "handicap" in unfair practice cases brought under Wash. Rev. Code § 49.60.180.[4]

[1] First, the record strongly suggests that Kimbro's attendance record from 1976 to 1981 would not have been substandard but for his migraine-related absences. More importantly, his final warning and ultimate discharge for excessive absenteeism were precipitated by his migraine-related absences. Thus, the record clearly demonstrates a sufficient causal connection between Kimbro's termination and his migraine condition to satisfy § 162-22-080(1)(a).

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[4]Wash. Admin. Code § 162-22-040 provides:

> (1) For the purpose of determining whether an unfair practice under RCW 49.60.180, 49.60.190, or 49.60.200 has occurred:
>
> (a) A condition is a "sensory, mental, or physical handicap" if it is an abnormality and is a reason why the person having the condition did not get or keep the job in question . . . . In other words, for enforcement purposes a person will be considered to be *handicapped* by a sensory, mental, or physical condition if he or she is *discriminated against because of the condition* and the condition is abnormal.
>
> (b) "The presence of a sensory, mental, or physical handicap" includes, but is not limited to, circumstances where a sensory, mental, or physical condition:
>
> (i) is medically recognizable or diagnosable;
>
> (ii) exists as a record or history; or
>
> (iii) is perceived to exist, whether or not it exists in fact.
>
> (2) An example of subsection (1)(b)(ii) is a medical record showing that the worker had a heart attack five years ago. An example of subsection (1)(b)(iii) is rejection of a person for employment because he had a florid face and the employer thought that he had high blood pressure, but in fact he did not have high blood pressure.

(Emphasis in original).

[2] Kimbro's condition also falls well within the second prong of the applicable standard. Kimbro has been diagnosed as suffering from a recognized medical condition known as cluster migraines. His medical record indicates that he has been plagued by cluster migraines, with varying levels of intensity and frequency, sine 1976. Accordingly, Kimbro's cluster migraine condition is both medically recognizable and exists as a matter of record. *See* § 162-22-080(b)(1)(ii),(iii). Consequently, Kimbro clearly was handicapped under Washington antidiscrimination law.[5]

B.

[3] As noted above, the district court reasoned that because ARCO management did not have sufficient knowledge of Kimbro's migraine condition, ARCO could not be held responsible for any failure to attempt a reasonable accommodation. While the district court committed no error in concluding that ARCO management personnel were unaware of Kimbro's condition, the district court erred as a matter of law in finding that ARCO could not be held liable in this case for failing to accommodate Kimbro's condition.

[5]It should be noted that *Phillips*' adoption of Wash. Admin, Code § 162-22-080 as the appropriate handicap definition for unfair employment practice cases overturned *Reese*, 107 Wash.2d at 579, 731 P.2d at 506. *Reese* had approved of Wash. Admin. Code § 162-22-030 as the proper handicap standard, *see id*, a far narrower standard than that set forth in *Phillips*. *See* Wash Admin. Code § 162-22-030 (to qualify as a handicap, "impairments must be material rather than slight; static and permanent in that they are seldom fully corrected by medical replacement, therapy, or surgical means"). However, the district court apparently applied the *Reese* definition to determine whether Kimbro's condition qualified as a handicap, since the supreme court had not yet announced its decision in *Phillips* at the time of Kimbro's trial. In light of the fact that the district court found that Kimbro's condition qualified as a handicap even under the narrower *Reese* test, and that the record clearly supports a finding of the existence of a handicap under *Phillips*, we believe it is proper to affirm the district court's conclusion on this issue.

There is substantial evidence in the record to support the finding that ARCO management personnel who made the final decision to discharge Kimbro were personally unaware of Kimbro's migraine condition and its significant causative effect on Kimbro's absenteeism and tardiness. While testimony at trial revealed that management personnel were aware of the fact that Kimbro had been missing work because of headaches and that Jack Jackson, Kimbro's supervisor, had discussed Kimbro's headache difficulties with some of the management, there is no evidence which clearly demonstrates that any of the management personnel knew or believed that Kimbro suffered from a severe diagnosable medical condition.

[4] The record does demonstrate, however, that Jackson was fully aware of the fact that Kimbro's headaches were a manifestation of a serious medical condition. The record reveals that Kimbro frequently discussed his condition with Jackson. Jackson knew Kimbro was receiving medication and treatment for the condition, and Jackson personally witnessed the debilitating effects of the headaches. ARCO's liability for failure to attempt reasonable accommodations thus turns on the extent to which Jackson's knowledge of the severity of Kimbro's migraine condition can be imputed to ARCO.

Since reasonable accommodation cases rarely involve a dispute over whether the employee actually had notice of the physical disability at issue, there is a dearth of authority on the propriety of imputing knowledge from an employee-supervisor to the employer in this type of action. Consequently, we must turn to traditional agency/employer-employee principles to determine whether ARCO should be charged with knowledge of Kimbro's condition in this case. *Cf. Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986) (courts should look to agency principles for guidance in determining employer liability under Title VII for sexual harassment by their supervisors).

[5] It is well settled under Washington law that "the principal is chargeable with, and bound by, the knowledge of or notice to his agent received while the agent is acting as such within the scope of his authority and in reference to a matter over which his authority extends." *Zwink v. Burlington Northern Co.*, 13 Wash. App. 560, 566, 536 P.2d 13, 17 (1975) (quoting 3 Am. Jur. 2d *Agency* § 273 at 635 (1962)); *Pilling v. Eastern & Pacific Enterprises*, 41 Wash. App. 158, 163, 702 P.2d 1232, 1236 (1985) ("Knowledge of the agent is imputed by law to the principal."); *Roderick Timber Co. v. Willapa Harbor Cedar Products, Inc.*, 29 Wash. App. 311, 316-17, 627 P.2d 1352, 1355 (1981) ("As a general rule the knowledge of the agent will be imputed to the principal only where it is relevant to the agency and the matters entrusted to the agent."); *Rocky Mountain Fire & Casualty Co. v. Rose*, 62 Wash.2d 896, 903, 385 P.2d 45, 49 (1963) (same); Restatement (Second) of Agency § 272 (1958). More specifically, if notification is given to an agent who has, or appears to have authority "either to receive it, to take action upon it, or to inform the principal or some other agent who has duties in regard to it," then such notice is chargeable to the principal. *Roderick Timber*, 29 Wash. App. at 317, 627 P.2d at 1355 (quoting Restatement (Second) of Agency § 268, comment c (1958)).

[6] Moreover, as the court in *Zwink* recognized, these traditional agency principles are fully applicable in the employment context. 13 Wash. App. at 566, 536 P.2d at 17 ("[a]lthough [the imputation of knowledge] rule is stated in the context of principal-agent relationship, it is at least equally applicable to the master-servant or employer-employee relationship"; *see also* Restatement (Second) of Agency § 283 (1958). Indeed, in *Zwink* the court found that, as a matter of law, a defendant railroad company had notice of any malfunctioning or nonfunctioning of a railroad crossing signaling device when an employee crossing guard was stationed at the crossing and in immediate charge of it at the

time of the accident. 13 Wash.2d at 566-67, 536 P.2d at 16-18.

Applying the foregoing principles to this case, it is clear that ARCO is bound by Jackson's knowledge of Kimbro's medical condition. The district court's findings and Jackson's testimony at trial clearly establish that Jackson not only had authority to receive information regarding Kimbro's medical condition, but also had a responsibility to disclose the nature and severity of ARCO's serious medical condition to ARCO management.

[7] The district court explicitly found that ARCO's "personnel policies, including those related to attendance, are administered through its working supervisors. ARCO's personnel administration policies require employees to bring scheduling problems. . . and other personnel-related matters to their supervisors." The district court further found that Jackson "maintained an attendance log upon which was recorded the absences of employees and the reasons for those absences." Moreover, Jackson testified at trial that when ARCO considered taking disciplinary action against an employee, it was customary to hold a meeting with the employee's supervisor and other ARCO management personnel responsible for making a final decision with regard to the particular employee. Jackson explained that at a meeting addressing an employee's attendance record, the attendance log and the reasons for absences are discussed in some detail.

[8] Since ARCO personnel policies require that employees raise all personnel-related matters with the supervisor, both the employee and management rely on the supervisor to serve as a conduit for precisely the type of critical information that was evidently not fully communicated to management in this case. As the imputation of knowledge rule indicates, when an employee-supervisor fails to carry out his responsibilities to both a third person and his employer, the employer must bear the ultimate burden of its employee's error. *See Roderick*

Timber, 29 Wash. App. at 317, 527 P.2d at 1355. Thus, since Jackson clearly acquired knowledge of Kimbro's migraine condition while serving in his supervisory function and had a duty to communicate such knowledge to management, ARCO, as a matter of law, was on notice of Kimbro's migraine condition. Accordingly, ARCO should be held responsible for any failure to make a reasonable accommodation.[6]

C.

[9] Throughout this proceeding, Kimbro has maintained that ARCO could have reasonably accommodated his disability in one of three ways: (1) by continuing to allow him to use his accumulated sick leave for those days or hours in which his migraine prevented him from working; (2) by continuing to permit him to work after normal operating hours to compensate for any time missed as a result of his headaches; (3) by granting a leave of absence in June 1981 to provide him with an opportunity to make it through the 1981 episode of cluster migraines and to seek long-term effective treatment for his migraine condition.

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[6]ARCO neither disputes the fact that Jackson knew Kimbro suffered from a severe migraine condition nor that such knoledge is imputable to ARCO. It contends, however, that since Jackson did not know that Kimbro actually suffered from a "handicap," within the meaning of § 49.60.180, ARCO cannot be liable even if ARCO is chargeable with Jackson's knowledge. ARCO's argument is clearly frivolous.

Under ARCO's proposed construction of § 49.60.180, an employer's liability for handicap discrimination in any particular case would turn on the employer's good faith determination of whether an employee's condition constituted a handicap in light of the applicable regulations and decisional law. Needless to say, such a construction would turn the handicap discrimination law on its head as it would permit the employer to the serve as fact-finder under a statute that was enacted to regulate the employer's conduct. It is the domain of the jury or judge, not the employer, to determine whether a condition constitutes a handicap. As long as the employer is on notice that an employee suffers from a serious medical condition, it may be liable under the handicap discrimination law.

ARCO contends that, notwithstanding its notice of Kimbro's migraine condition, its failure to make any of the proposed accommodations does not constitute an unfair employment practice under § 49.60.180. While ARCO appeared to concede at oral argument that § 49.60.180 places an affirmative obligation on an employer to come forward with reasonable accommodations even in the absence of a formal request from a handicapped employee,[7] it maintains nonetheless that liability should not be imposed since (1) the first two accommodations would have imposed an undue hardship on ARCO and (2) the statute does not obligate an employer to offer a leave of absence to a handicapped employee when there is no established treatment program available for the employee's condition. We shall consider each of ARCO's contentions in turn.

As an initial matter, we note that whether a particular accommodation would have imposed an undue hardship on the employer is a question of fact. *Phillips*, 766 P.2d at 1103; *Reese v. Sears, Roebuck & Co.*, 107 Wash.2d 563, 580, 731 P.2d 497, 506-07 (1987); Wash. Admin. Code § 162-22-080(3) sets forth the standard for determining whether a proposed accommodation in fact places undue hardship on the employer. The regulation provides:

> The cost of accommodating an able handicapped worker will be considered to be an undue hardship on the conduct of the employer's business only if it is unreasonably high in view of the size of the employer's business, the value of the employee's

[7]We note that ARCO is correct in recognizing that § 49.60.180 "requires that the employer affirmatively assist the employee who becomes handicapped while employed." *Dean*, 104 Wash.2d at 638-39, 708 P.2d at 397 (employer liable for failing to make alternative job opportunities known to disabled employee and for failing to assist employee in applying for such positions). Thus, an employee's failure to formally request an accommodation—as occurred in this case—does not absolve the employer of its obligation to reasonably accommodate its employees' disabilities. *See id.*

> work, whether the cost can be included in planned remodeling or maintenance, the requirements of other laws and contracts, and other appropriate consideration.

Wash. Admin. Code § 162-22-080(3). This regulation, promulgated by the Washington Human Rights Commission, the agency charged with administering Washington's employment discrimination law, is entitled to great weight. *Holland*, 90 Wash.2d at 389, 583 P.2d at 623 (1978); *Hama Hama Co. v. Shorelines Hearing Bd.*, 85 Wash.2d 441, 448, 536 P.2d 157, 161 (1975). An employer bears the burden of establishing that a proposed accommodation "would impose an undue hardship on the conduct of [its] business." *Phillips*, 766 P.2d at 1103 (quoting Wash. Admin. Code § 162-22-080(1)); *Clarke v. Shoreline School Dist. No. 412*, 106 Wash.2d 102, 118, 720 P.2d 793, 802 (1986).

[10] The district court found that the first two proposed accommodations would have imposed an undue hardship on ARCO's ability to effectively operate its refinery. We find clear support in the record for these findings.[8] As to the option of granting a leave of absence in 1981, the district court, in its

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[8]With respect to the first proposed accommodation, the district court, in its post-trial oral remarks, found that ARCO's legitimate need to schedule all machinist projects in advance made it unreasonable to require ARCO to permit a disabled employee such as Kimbro to use unexhausted sick leave days intermittently on days or hours when his migraine condition precluded his ability to work. Though not incorporated into the formal findings, we may properly consider this district court finding since it is consistent with the court's formal findings and merely serves to supplement them. *Southern Pacific Land Co. v. United States*, 367 F.2d 161, 162 n.1 (9th Cir. 1966); C. Wright & A. Miller, *Federal Practice & Procedure*, Civil § 2580 (1971).

As to the second proposed accommodation of compensating for absent time by working after regular hours, the district court found safety considerations counselled against regularly allowing an individual machinist to work by himself after hours.

post-trial oral remarks, declared that such an accommodation would have been reasonable. We also find no error in this conclusion, *see infra* n.6 (appellate court may consider oral findings as long as they are consistent with formal findings), as no evidence in the record even remotely suggests that offering Kimbro a leave of absence in 1981 would have placed an undue hardship on ARCO.

Indeed, ARCO does not take exception to this finding; instead, ARCO argues that it cannot be held liable for failing to grant a leave of absence when at the time of Kimbro's recurrence of cluster migraines in 1981, no specific treatment program was then available for Kimbro's condition. The absence of a specific treatment program, however, clearly does not preclude the imposition of liability for failing to offer a leave of absence in this case. As long as at the time of Kimbro's termination, there were "plausible reasons to believe that the handicap [could have been] accommodated" by the a leave of absence, ARCO is responsible for its failure to offer such a leave. *See Prewitt v. United States Postal Service*, 662 F.2d 292, 311 (5th Cir. 1981).[9]

[11] Here, Kimbro's cluster migraine condition during the relevant period was characterized by acute periods of migraines lasting no longer than a few months, followed by long periods of relative remission in which Kimbro would only experience occasional migraines. Thus, it was clearly plausible that a leave of absence in 1981 would have provided

[9]*Prewitt* involved a claim brought under the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq*, the federal counterpart to § 49.60.180 in the handicap discrimination context. The supreme court of Washington has clearly held that it is appropriate to look to federal decisions interpreting the Rehabilitation Act to determine the proper construction of the state's law prohibiting handicap discrimination. *Clarke*, 104 Wash.2d at 118, 720 P.2d at 803; *see generally Fahn v. Cowlitz County*, 93 Wash.2d 368, 376, 610 P.2d 857, 861 (1980) (when Washington statutes have the same purpose as federal counterparts, federal decisions may be instructive in construing state law).

Kimbro with an opportunity to endure the 1981 acute episode and then return to work unimpaired for the foreseeable future. Moreover, at the time of his discharge, it was also plausible that a prolonged leave from work would have given Kimbro and his physicians an opportunity to design an effective treatment program. While it is altogether possible that Kimbro's migraine episodes may have recurred upon his return to work following a leave of absence, such a possibility does not foreclose a finding of liability for failure to accommodate Kimbro's migraines in 1981. As long as a reasonable accommodation available to the employer could have plausibly enabled a handicapped employee to adequately perform his job, an employer is liable for failing to attempt that accommodation. Accordingly, ARCO's failure to offer a leave of absence to Kimbro constitutes a violation of Washington's handicap discrimination law.[10]

IV.

[12] Kimbro's complaint also sets forth a breach of contract claim. Kimbro alleges that ARCO's Sick leave Plan modified his employment-at-will status to the extent that the Plan constituted a binding promise that ARCO employees could not be terminated for excessive absences as a result of non-occupational illness or injury as long as the employee retained unexhausted sick leave days to cover such absences. Thus, Kimbro claims that ARCO breached its contractual obligation by terminating him for excessive absenteeism resulting from his migraine and back conditions when he still had several months of unexhausted sick leave at the time of his discharge. Kimbro also contends that ARCO's written

[10]This is not to say that ARCO would necessarily have been obligated to grant a second leave if the migraine condition recurred after return from the initial leave. Indeed, the fact that an accommodation has been attempted and was unsuccessful is a relevant consideration for the fact-finder and may in fact prove dispositive in determining whether failure to permit subsequent leave constituted failure to make a reasonable accommodation.

attendance employment policy altered his terminable-at-will contract by contractually obligating ARCO to explicitly consider medical reasons underlying an employee's poor attendance before taking any disciplinary action. ARCO's failure to make such an inquiry and give due weight to his migraine condition prior to his termination, Kimbro argues, constituted a breach of this contractual duty.

The district court rejected Kimbro's breach of contract claim, finding that neither the Sick Leave Plan nor the written attendance policy modified or altered the parties' employment-at-will relationship. We affirm the district court's judgment on these claims.

In *Thompson v. St. Regis Paper Co.*, 102 Wash.2d 219, 685 P.2d 1081 (1984), the Supreme Court of Washington held that a terminable-at-will employment relationship may be modified, and the employer contractually bound, by "promises of *specific treatment in specific situations*" made in employee manuals or handbooks issued by employers to their employees. *Id* (emphasis in original). The employer will be bound, however, only by those specific promises upon which the employee justifiably relies. *Id*; *Stewart v. Chevron Chemical Co.*, 111 Wash. 2d 609, 762 P.2d 1143, 1146 (1988). Specifically, the employee must show that the promise induced him to remain on the job or not seek other employment. *See id.*

[13] Kimbro's evidence at trial failed to meet this evidentiary burden. With respect to the Sick Leave Plan, Kimbro introduced no evidence that his interpretation of the Plan—an unconditional entitlement to the use of all accumulated sick leave days—actually induced him to remain as a machinist at ARCO. Thus, he failed to show the requisite degree of reliance to establish that the Plan contractually obligated ARCO to take no disciplinary action against an employee retaining sick leave days. *See Stewart*, 762 P.2d at 1146. Moreover, even assuming Kimbro had made a suffi-

cient showing of subjective reliance, his claim still must fail as the district court's finding demonstrates that such reliance was not objectively justified. *See Thompson*, 102 Wash.2d at 233, 685 P.2d at 1087-88. The district court concluded, based on the testimony of several ARCO employees, that employees at the ARCO refinery were generally aware that they could be subject to discipline, including discharge, for excessive absenteeism, even if their sick pay allowance had not been exhausted. This finding is clearly supported by the record. Accordingly, under *Thompson* and its progeny, Kimbro's employment-at-will relationship was not modified by the Sick Leave Plan.

Kimbro's contention that ARCO's written attendance policy constitutes a binding promise also lacks merit.[11] First, it is highly questionable whether ARCO's attendance policy is the

[11]The relevant section of ARCO's attendance policy states:

> It should be noted that each absence record must be evaluated on its own merit. The reasons for each absence must be evaluated. For example:
>
> 1. Has a serious illness, major personal problem or urgent personal problem necessitated the employee to lose time from work?
> 2. Is the record showing a tendency of absences on Fridays or Mondays (attempting to create long weekends)?
> 3. Do the absences follow or precede scheduled or worked overtime?
> 4. Are the absence dates on the same days as scheduled major sporting events or immediately prior to or following scheduled vacations or holidays?
> 5. Has the employee been absent due to sickness more than five (5) days during the year?
> 6. Does the absence record include any absence without leave (AWOL)?
> 7. Have the absences for personal business been given prior approval by supervision?

type of written policy statement that falls within the *Thompson* contract modification doctrine. The policy is neither part of an employee handbook, nor generally distributed to employees; rather, the policy is contained in a supervisor's manual for the supervisors' use in administering ARCO's personnel policy. The employees are permitted to review the supervisor's manual, however, if they request to do so.

Thompson and its progeny seem to contemplate that an at-will relationship is subject to modification only by policies contained in a personnel manual or, at the very least, statements of policy actually distributed to employees. *See Thompson*, 102 Wash.2d at 633, 685 P.2d at 1088 (employee manual); *Brady v. Daily World*, 105 Wash.2d 770, 772-73, 718 P.2d 785, 786 (1986) (personnel handbook distributed to employees; *Stewart*, 762 P.2d at 1145 (Regulating Manual distributed to employees). We need not determine the extent to which employment policies must be made available to employees in order to fall within the ambit of *Thompson*, however, since, in any case, ARCO's attendance policy does contain the specificity necessary to create a binding contract.

ARCO's attendance policy states only that "the reasons for each absence must be evaluated," and then lists specific questions that may be relevant in the evaluation of individual attendance records and to the ultimate determination of whether to take disciplinary action. The policy neither discusses how much weight should be placed on the fact that a serious illness is the underlying cause of an attendance problem nor does it provide any indication of the relative importance of the other factors. Accordingly, the policy cannot be held to modify the at-will relationship. *See Stewart*, 762 P.2d at 1146 (where policy only requires company to consider particular factors in lay-off decisions, but assigns no relative weight or value to any of the criteria, policy lacks sufficient specificity to create a binding promise). Thus the district court properly entered judgment in favor of ARCO on the breach of contract claims.

V.

Kimbro also claims that the district court erred in finding that he was not terminated in retaliation for prior use of ERISA-protected sick leave benefits in violation of ERISA. We find no error in the district court's rejection of Kimbro's ERISA claim.

[14] Section 510 of ERISA, 29 U.S.C. § 1140, prohibits an employer from taking any adverse employment action against an employee "for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . ."[12]

Generally speaking, an unlawful reprisal occurs when "(1) an employee participates in a statutorily protected activity, (2) an adverse employment action is taken against him or her, and (3) a causal connection existed between the two." *McKinney v. Dole*, 765 F.2d 1129, 1143 (D.C. Cir. 1988). This general reprisal standard clearly applies in the ERISA context. *See Baker v. Kaiser Aluminum & Chemical Corp.*, 608 F. Supp. 1315, 1318 (D.C. Cal. 1984) ("To recover under § 1140, plaintiff must show that defendant terminated him with the 'specific intent' to interfere with his rights under defendant's benefits plans."); *Watkinson v. Great Atlantic & Pacific Tea Co.*, 585 F. Supp. 879, 882-83 (E.D. Pa. 1984).

[15] Thus, to establish a violation under § 1140, a plaintiff-employee must show that his prior use of sick leave benefits was the motivating force behind his discharge. Kimbro, however, failed to adduce at trial any evidence from which one

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[12]"It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ."

29 U.S.C. § 1140.

could reasonably infer that his discharge was in reprisal for his prior use of sick leave benefits. While the timing of a discharge may in certain situations create the inference of reprisal, *see Hochstadt v. Worcester Foundation for Experimental Biology, Inc.*, 425 F. Supp. 318, 324 (D.Mass 1976), *aff'd* 545 F.2d 222 (1st Cir. 1976) (plaintiff may establish unfair reprisal under Title VII by showing "his discharge followed his protected activities within such period of time that the court can infer retaliatory motivation"), there is nothing in the record which raises any suspicion regarding the timing of Kimbro's termination. Kimbro's back surgery, which required the continuous use of sick leave days over a sustained period occurred five years before his discharge. Moreover, his use of benefits immediately prior to his termination was not at a significantly greater rate than his use during previous periods in which he was suffering from migraines or having difficulty with his back.[13] Accordingly, Kimbro has failed to establish a prima facie case of unfair reprisal for use of ERISA-protected benefits.

VI.

Having disposed of Kimbro's claim on appeal, we next turn to ARCO's contention that the district court abused its discretion in refusing to award it attorneys' fees under ERISA, 29 U.S.C. § 1132(g). Specifically, ARCO claims that since it had already pared down its fee request to only those fees attributable to the defense of Kimbro's ERISA claim, it was improper for the district court to weigh the fact the ERISA claims were collateral to the main thrust of the lawsuit when determining the propriety of a fee award. Finding no abuse of discretion in the district courts refusal to award ARCO its ERISA-related fees, we affirm the district court order. *See Hummel v. S.E. Rykoff & Co.*, 634 F.2d 446, 452 (9th Cir. 1980) (a district court's determination regarding the award of

[13]While Kimbro also argued at trial that he was discharged to prevent his use of company disability benefits, he has abandoned this claim on appeal.

attorneys' fees under ERISA, 29 U.S.C. § 1132(g), should be reversed only for abuse of discretion).

In *Hummell, supra,* the Ninth Circuit set forth several factors that should be considered in deciding whether to award attorneys' fees under § 1132(g):

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

Id. at 452.

In this case, the district court applied several of the *Hummell* factors and found it inappropriate to award attorneys' fees. Specifically, it concluded that the lawsuit had not been brought in bad faith, that ARCO was clearly able to pay its own fees while Kimbro was essentially without resources, and that an assessment of attorneys' fees against Kimbro might "dissuade similarly situated plaintiffs from bringing suit." In making its decision, the court also emphasized that Kimbro's ERISA claim was collateral to the main issues of the lawsuit.

We find no error in the district court's treatment of ARCO's request for fees. The district court found the first three *Hummel* factors all counseled against awarding ARCO fees. Although the court also apparently considered the fact that the ERISA claim was a collateral issue of the lawsuit, a factor not suggested in *Hummel,* ARCO fails to provide any authority which suggests that it is impermissible to consider such a factor in making a fee award determination. Moreover,

even assuming the district court should not have considered the collateral nature of the ERISA claim, its decision to deny fees still cannot be deemed an abuse of discretion since the district found that several of the *Hummel* criteria weighed against a fee award as well. Accordingly, the district court did not abuse it discretion in denying ARCO's motion for attorneys' fees under ERISA.

VII.

The district court judgment should be affirmed with respect to Kimbro's breach of contract and ERISA claims. The district court's denial of ARCO's request for attorneys' fees should also be affirmed. However, the district court erred in finding that ARCO had not engaged in unlawful handicap discrimination. Since ARCO failed to make a reasonable accommodation to Kimbro's migraine condition, we reverse the judgment of the district court on the handicap discrimination claim and remand for a determination of damages. Plaintiff is entitled to costs.

AFFIRMED IN PART AND REVERSED IN PART.

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL KIMBRO, Plaintiff-Appellant/ Cross-Appellee, v. ATLANTIC RICHFIELD COMPANY, INC., Defendant-Appellee/ Cross-Appellant.	No. 87-3903 87-4007 D.C. No. CV-84-656-D **ORDER**

Before: ALARCON, FERGUSON, and THOMPSON, Circuit Judges

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judges Alarcon and Thompson have voted to reject the suggestion for a rehearing *en banc* and Judge Ferguson recommended the denial of the *en banc* request.

The full court has been advised of the suggestion for *en banc* hearing and no judge of the court has requested a vote on the suggestion for rehearing *en banc*. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing *en banc* is rejected.

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DANIEL KIMBRO, Plaintiff, v. ATLANTIC RICHFIELD COMPANY, INC., Defendant.	No. C84-656D **PLAINTIFF'S MEMORANDUM IN SUPPORT OF PROPOSED FINDINGS AND CONCLUSIONS**

INTRODUCTION

This memorandum lists cites the portions of the trial record which support the proposed Findings of Fact proposed by the plaintiff. Each of the numbered paragraphs in this memorandum corresponds to the numbered Finding of Fact proposed by the plaintiff.

Findings 1, 2, 3 and 4. The background information contained in these Findings was undisputed. The substance of the Findings is contained in Paragraphs 1 through 4, Admitted Facts, Pretrial Order.

Finding 5. The first sentence describes recurrences of the cluster migraine and back conditions; this information was undisputed. See Paragraph 5, Admitted Facts section of Pretrial Order. The second sentence of this proposed Finding is the substance of the Court's oral statement, made during its oral decision, that Kimbro was not disabled.

Finding 6. The first sentence was undisputed at trial. See Pretrial Order, Admitted Facts, number 6. The second sentence is a compilation of information contained in ARCO payroll records, (Exhibit A-10) and Supervisor's Logs (Exhibit 9), also undisputed at trial. This information was presented to the court (in the illustrative exhibit discussed in plaintiff's response to defendant's motion to dismiss made at the close of plaintiff's case), and was not disputed at trial.

Finding 7. Except for the last sentence, this Finding is taken directly from paragraph 6, Admitted Facts, Pretrial Order. The last sentence, concerning the sleep disruptive effects of Kimbro's cluster migraine condition, was testified to at trial by Kimbro; Jim Webber; and Dr. Steger. Their testimony was undisputed.

Finding 8. This information is contained in paragraph 7, Admitted Facts, Pretrial Order. Plaintiff's testimony as to recurrences was unrebutted and confirmed by notations on the Supervisor's Attendance Logs, Exhibit 9 at trial.

Finding 9. Trial testimony of Dan Kimbro, Jack Jackson, and all machine shop co-workers. All this testimony was unrebutted.

Finding 10. This information was undisputed at trial. Testimony of plaintiff witnesses Decker, McKay, McIvor, Wren, Froneberger, Webber and Cranford; defendant witnesses (*sic*) Mickas. All this testimony was unrebutted.

Finding 11. This information was undisputed at trial. Sick Leave Plan (Exhibit 13); Anthony Mickas' testimony that Kimbro would have received a copy of the Sick Leave Plan was undisputed.

Finding 12. This information was undisputed also. Much of it is contained in paragraph 12, Admitted Facts, Pretrial

Order. The remainder (indicating that ARCO could and did require medical information to verify illnesses from time to time) was the subject of testimony by Anthony Mickas, undisputed, and Larry Cranford, undisputed.

Finding 13. All of this was undisputed at trial. Testimony of defendant witnesses Anthony Mickas; Jack Jackson; Ralph Sisco.

Finding 14. Undisputed at trial. See also Sick Leave Plan, Exhibit 13, and Pretrial Order, Admitted Facts, paragraph 13.

Finding 15. This was undisputed at trial. The attendance policies were Exhibits 16 and 17.

Finding 16. Testimony of defendant witness Anthony Mickas, undisputed at trial.

Finding 17. All this information is contained in the attendance control policy itself, in the trial testimony of Anthony Mickas, undisputed, when Mickas was called by plaintiff as plaintiff's witness, and in the testimony of witnesses Froneberger, Wren, Mickas and McIvor.

Finding 18. Information in first two sentences was part of Court's oral decision of March 4, 1987. Information in last sentence was derived from cross examination testimony of defendant witness Anthony Mickas, undisputed, which established that all individuals terminated before Kimbro, even those ostensibly terminated for attendance-related reasons, were actually terminated for misconduct or other reasons not related to legitimate illness.

Finding 19. Trial testimony of defendant witnesses Anthony Mickas and Jack Jackson, undisputed. See also testimony of Kimbro's machine shop co-workers, also undisputed.

Finding 20. This information is contained on the Supervisor's Log, Exhibit 9, and is undisputed.

Finding 21. Trial testimony of defendant witnesses Ralph Sisco and Jack Jackson, undisputed.

Finding 22. Trial testimony of Dan Kimbro and employee witnesses Froneberger, Wren, McIvor, McKay, Webber, and defendant witness Jack Jackson, all undisputed.

Finding 23. Trial testimony of defendant witnesses Ralph Sisco and Jack Jackson. ARCO's policy regarding review of medical records prior to discharge was described in trial testimony of defendant witness Anthony Mickas, unrebutted.

Finding 24. Statement contained in Court's oral decision of March 4, 1987.

Finding 25. Statement contained in Court's oral decision of March 4, 1987; see also trial testimony of Daniel Kimbro, unrebutted.

Finding 26. Court's oral decision of March 4, 1987.

Finding 27. Trial testimony of Daniel Kimbro, unrebutted. See also paragraph 11, Admitted Facts, Pretrial Order.

Finding 28. Trial testimony of witnesses Froneberger, Wren, Fosberg, McIvor, and McKay, unrebutted.

Finding 29. Court's oral decision of March 4, 1987.

Finding 30. Court's oral decision of March 4, 1987.

Finding 31. Trial testimony of defendant witnesses (*sic*) Ralph Sisco was that Kimbro's attendance record for prior years was reviewed when the decision to give him a final warning was made in March, 1981. This testimony was unrebutted.

and was confirmed by trial testimony of defendant witness Anthony Mickas indicating practice was to review attendance records for several years when making decisions to discipline.

Finding 32. Essentially undisputed at trial. See Finding 6, Exhibit A-10, and Exhibit 9, all undisputed at trial.

Finding 33. Trial testimony of defendant witnesses Ray Snover; Ralph Sisco; Anthony Mickas; and Jack Jackson was that Kimbro was discharged for failing to meet the terms of his March, 1981, final warning, regarding his attendance record.

Finding 34. Undisputed at trial; see Supervisor Log, Exhibit 9. See also testimony of Daniel Kimbro on rebuttal.

Finding 35. See illustrative exhibit containing data compiled by plaintiff from Exhibits A-10; Exhibit 9; and Exhibit 28, indicating that Kimbro's absence record for illness unrelated to migraine and back conditions was less than absences of 24 other employees who were not terminated (Exhibit 28). This information was unrebutted.

Finding 36. This conclusion follows logically from the fact that other employees whose absences equalled or exceeded Kimbo's (*sic*) absences which were not related to handicaps were not terminated.

Finding 37. Trial testimony of Ralph Sisco, Anthony Mickas, and Jack Jackson, undisputed, was that Kimbro's attendance record was considered unsatisfactory because of the total hours of absence and the number of occurrences of absence, and the fact that the illnesses were legitimate and related to the back and/or headache conditions was not considered significant.

Finding 38. Court's oral decision of March 2, 1987, granting defendant's motion to dismiss on this point.

Finding 39. All this information was undisputed at trial.

Finding 40. The trial testimony of Anthony Mickas concerning distribution of Summary Plan Descriptions was unrebutted. Trial testimony of Dan Kimbro on this point was also unrebutted.

Finding 41. Court's oral decision dismissing plaintiff's ERISA claim, March 4, 1987.

CONCLUSIONS OF LAW

1. Undisputed. See Pretrial Order.
2. Handicap is defined in WAC 162-22-040; see also *Reese v. Sears, Roebuck & Co.* 107 Wn.2d 563 (1987).
3. Court's oral decision, March 4, 1987.
4. Court's oral decision, March 4, 1987.
5. Court's oral decision, March 4, 1987.
6. Court's oral decision, March 4, 1987.
7. Court's oral decision, March 4, 1987.
8. Court's oral decision, March 4, 1987.

Respectfully submitted this ____ day of April, 1987.

RAAS, JOHNSEN, GARRETT & STUEN
Thomas E. Stuen
Deborra E. Garrett
Of Attorneys for Plaintiff

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DANIEL KIMBRO, Plaintiff, v. ATLANTIC RICHFIELD COMPANY, INC., Defendant.	No. C84-656D **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This case came on for trial commencing February 24, 1987, before the undersigned United States District Court Judge. Upon consideration of all the evidence, briefs and arguments, and having rendered its oral opinion on March 4, 1987, the Court now makes and enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Defendant Atlantic Richfield Company ("ARCO") has operated an oil refinery at Cherry Point near Ferndale, Washington, since it was built in 1971. Plaintiff Daniel Kimbro was employed there as a machinist from April 1971 until he was discharged in June 1981.

2. ARCO employs approximately 420 employees at the refinery, 190 in the Maintenance Department, including 22 machinists.

3. Throughout his employment at the refinery Kimbro's performance appraisals were generally good to excellent.

4. While he was employed with ARCO, Kimbro developed two medical conditions which caused him to miss work time. In 1976 Kimbro lost work time as a result of severe headaches diagnosed as a cluster migraine condition (see below). In 1977 he missed approximately 2½ months of work due to back surgery (a lumbar laminectomy, or disc excision). Following these absences Kimbro returned to work with notes indicating his doctors' approval that he return, with some restrictions following his back surgery which were shortly thereafter removed by his doctor.

5. Between 1977 and 1981, Kimbro experienced recurrences of the cluster migraine headaches and pain resulting from his back injury and surgery in 1977. While both conditions impeded him from working at various times during his employment, neither was disabling to the degree that made Kimbro unable to work.

6. During his employment Kimbro also missed work for reasons unrelated to either condition, including an ankle injury in 1980 and the flu and colds.

His absences for the last 5 years of his employment were:

	Total	Authorized Personal Business	Total Sick Leave	Sick Leave Related to Migraine and Back Condition	Other Sick Leave
1976 (6/10-12/31)	215.5	8	207.5	170.	37.5
1977	498.5	8.5	490.	472.	18.
1978	111.0	15.	96.	32.	64.
1979	94.	5.	89.	0.	89.
1980	320.	7.5	312.5	88.	224.5
1981	74.5	4.0	70.5	42.5	28.

7. Kimbro's migraine headaches have been diagnosed as a "cluster migraine" condition. Cluster migraine headaches are characterized by acute episodes of migraine, lasting for periods of up to an hour and occurring in clusters of several per day over a period of several weeks or months. During an acute episode, Kimbro is unable to work, sleep or perform any meaningful task. Between clusters (which can be months or even years apart), and between acute phases within a cluster period, normal activity is unimpaired. Acute episodes are generally unpredictable as to when they will occur. Nocturnal acute episodes, and the medication Kimbro took to decrease their effects, affected Kimbro's sleep patterns and caused him to oversleep on occasion.

8. Kimbro's clusters of acute episodes began in late 1976, ended in 1977, and recurred in 1981 prior to his discharge. Acute episodes also occurred occasionally, though not in clusters of months or weeks, between 1976 and 1980.

9. Kimbro's acute episodes were evident to those who had contact with him while they were occurring. When an acute episode occurred while Kimbro was at work, his supervisor Jack Jackson allowed him to stop working and rest or visit the company's medical office until the episode had subsided.

10. Since it was established in 1971, ARCO's Cherry Point refinery has maintained an articulated personnel policy favoring the economy and efficiency of a non-union environment. Called the "Union-Free Environment Policy," this policy states the goals of acquiring and retaining employees on a longterm basis, and persuading them to refrain from electing a union to represent them, by offering wages and benefits comparable to those offered by unionized oil refineries. ARCO's Cherry Point refinery offers liberal wages and benefits which increase with length of employment. Among the benefits offered are a sick leave plan; two disability plans; a retirement plan;

various types of unpaid leave of absences; and other benefit plans not directly at issue here.

11. One of ARCO's benefit policies is its Sick Leave Plan, admitted at trial as Exhibit 13, whose provisions are incorporated in these Findings as if fully set out in them. The written sick leave plan description is distributed and explained to employees at orientaiton, and updates are mailed to their homes from time to time. Like all ARCO employees, Kimbro received given copies of the Sick Leave Plan.

12. Kimbro used sick leave benefits when an illness or injury prevented him from working. He met all the qualifying requirements for use of sick leave benefits. All Kimbro's sick leave absences were caused by legitimate illness or injury covered by the sick leave plan, and he qualifiifed (*sic*) for the sick leave benefits he received. ARCO did not dispute the legitimacy of any of these absences. ARCO could require employees to supply medical information to verify illness, and it has required this of several employees in the past, but never asked Kimbro to supply such verification.

13. ARCO did not suspect or allege that any of Kimbro's absences, which included sick leave and unpaid personal business (requiring prior authorization by the immediate supervisor) involved misconduct or other failure to satisfy its requirements for use of the leave time involved. Rather ARCO's position was that regardless of the legitimacy of his absences, Kimbro's attendance was unsatisfactory and justified his termination.

14. At the time of his termination, Kimbro's unused sick leave allowance was 10 weeks of full salary and at least 36 weeks of half salary. Consistent with the terms of the policy, he was not paid for the sick leave remaining when he was discharged.

15. ARCO maintains a written policy describing its attendance requirements (Exhibits 16 and 17), incorporated in these Findings as if fully set out in them. This policy requires that employees whose attendance is considered unsatisfactory receive informal counseling from their supervisors as a first step; counseling with a memorandum to the file as a second step; and final warning as a third step prior to discharge. These procedures were followed in Kimbro's case.

16. The written attendance policy is contained in a supervisor's manual distributed to supervisors for their use in administering policy. While employees are permitted to review the supervisor's manual if they request to do so, the manual is not distributed to employees.

17. ARCO's attendance policy sets forth an attendance goal which is substantially less than the sick leave benefits which would accrue to a ten-year employee like Kimbro. Beginning in 1980, ARCO began to scrutinize employee attendance more closely in an attempt to minimize absenteeism. It also began to discipline employees whose absences exceeded the goal of 3%. In July 1981 it amended its attendance policy to reflect the more stringent evaluation standards it was using (Exhibit 17). Efforts to minimze absenteeism have continued to date, and the refinery attendance goal has increased steadily since 1980.

18. ARCO has interpreted its sick leave and attendance policies separately. Its employees are generally aware that they can be counseled or warned for absences considered excessive even if those absences result from legitimate illness or injury for which sick leave is paid. This had occurred before Kimbro's discharge, although Kimbro was the first employee to be discharged for absences resulting from legitimate illness.

19. Throughout Kimbro's employment and continuing to date, ARCO's personnel policies, including those related to attendance, are administered through its working supervisors. ARCO's personnel administration policies require employees to bring scheduling problems, requests for time off, inquiries about policies and benefits, and other personnel-related matters to their supervisors. The supervisor is directly responsible for counseling employees, reprimanding them or invoking other discipline as appropriate or as recommended by ARCO's Employee Relations Department staff. Kimbro's supervisor throughout his employment was Jack Jackson.

20. Kimbro's supervisor maintained an attendance log on which he recorded the absences of his subordinates including Kimbro, and the reasons for those absences. That log, Exhibit 9 at trial, indicates that over half of Kimbro's absences from 1976 through 1981 were related to his back and migraine conditions. It also indicates that most of Kimbro's absences in 1980 and 1979 were not related to these conditions.

21. In August 1980 a check of employee attendance statistics, performed routinely by Employee Relations representative Ralph Sisco, indicated that Kimbro's absences had exceeded 3%, the refinery goal at the time. Sisco wrote a memorandum to Kimbro's supervisor Jackson on August 15, 1980, instructing him to advise Kimbro that his attendance record was unsatisfactory and must be improved. Kimbro met with Jackson on or about August 19 and discussed his absences. Sisco's memorandum was placed in Kimbro's file and the refinery Employee Relations Department began to monitor his attendance, in accordance with the attendance policy.

22. In early 1981 Kimbro's cluster migraine condition began to recur. He was absent several times as a result, each time using sick leave. The absences were recorded on the supervisor's log, Exhibit 9.

23. In March, 1981, Kimbro's superiors met to discuss his attendance. Present at the meeting were the responsible Employee Relations representative (Ralph Sisco); the Manager of the Maintenance Department (Ray Snover); Jack Jackson, Kimbro's supervisor; and Norm Lynch, Jackson's immediate supervisor. Kimbro's migraine condition was discussed at the meeting as a reason for his absences. Kimbro's records from the refinery medical office were not obtained or reviewed, and ARCO's procedures which allow it to demand medical information from employees were not invoked, as ARCO generally does not review medical records in connection with discipline or discharge of employees. As a result of this meeting, Kimbro received a letter giving him "final warning" that excessive absenteeism would result in discharge (Exhibit 6). He was also advised by his supervisor orally that if he were tardy or absent again he would be discharged.

24. When supervisor Jackson counseled with and warned Kimbro about his absences, Kimbro indicated that he was trying to manage his migraine headaches. He did not demand to use sick leave.

25. Kimbro did not seek or inquire about a leave of absence; the accommodation he sought was to allow him to make up time after hours or on the weekend.

26. Although Kimbro's supervisor Jack Jackson was aware of the seriousness of his migraine condition, ARCO's management personnel who made the decision to terminate Kimbro were not. They did not know that the migraine condition was a handicap.

27. Kimbro was tardy three times after the final warning in March, each time because the wake-up call system he had devised with another employee failed when he overslept because of illness related to his cluster migraine condition. On

the third occasion, June 10, 1981, Kimbro was terminated. The stated reason for Kimbro's termination was an unsatisfactory attendance record involving excessive absenteeism and tardiness.

28. On the day that Kimbro was discharged, Jackson met with the machine shop crew and told them that if Kimbro had been tardy for any reason other than illness, for example if he had had a flat tire, he would not have been discharged.

29. Kimbro could have arranged a more reliable system of wake-up calls or alarms to assure that he was awakened in time to get to work during times when his sleep was impaired by headaches or medication. He did not do so.

30. ARCO could have accommodated Kimbro's cluster migraine condition informally, as his supervisor had earlier by allowing him to rest or go to the medical office during acute phases; or by allowing him to use sick leave when he could not work; or by allowing him a leave of absence during a period of acute phases.

31. The reason for Kimbro's discipline and final warning was his attendance record from 1976 through 1981.

32. Illnesses related to his back and migraine conditions comprised a substantial part of Kimbro's absences from 1976 through 1981.

33. The reason for Kimbro's discharge was his 1981 attendance record and his failure to meet the terms of his final warning.

34. Illnesses related to his migraine condition comprised a substantial part of Kimbro's absences during 1981.

35. If his absences related to his back and migraine conditions had not been considered in the evaluation of Kimbro's

attendance record, his record would have been comparable to or better than the records of numerous other employees who were not terminated.

36. But for his back and migraine-related absences, Kimbro would not have been terminated.

37. Kimbro was terminated because his absence record was considered excessive in total hours of absence and in the number of occurrences, or incidents, of absence. The fact that the absences were due to illness related to Kimbro's migraine and back conditions was not considered significant.

38. Kimbro was not terminated to prevent his use of company disability benefits, or in retaliation for prior use of company disability benefits.

39. At the time he was terminated, Kimbro's fringe benefits were reviewed with him by Employee Relations supervisor Ralph Sisco. Sisco did not consider Kimbro "disabled," so as to qualify for either long-term disability or disability retirement benefits. However, Sisco did not discuss with Kimbro whether he was or was not qualified for disability benefits, except to advise Kimbro that he did not meet length of service requirements for disability retirement and to tell him that his coverage under the long-term disability plan would expire at the end of the month.

40. Employees including Kimbro are provided Summary Plan Descriptions outlining fringe benefits available to them as ARCO employees, including long-term disability and disability retirement benefits, as well as sick leave and other allowances. Kimbro had never read the Summary Plan Description outlining ARCO's disability benefits, and never submitted a claim for disability benefits, or asked for further information from ARCO about how to seek such benefits.

41. The stated reasons for Kimbro's termination were the reasons motivating those who made the decision, rather than a pretext for an effort to deprive him of employee benefits to which he was or might become entitled.

CONCLUSIONS OF LAW

1. Jurisdiction is vested in this Court by virtue of 28 U.S.C. § 1132 (diversity of citizenship and amount in controversy), and 28 U.S.C. § 1131 (as an action under a federal statute, ERISA, and 29 U.S.C. § 1132 (ERISA's jurisdiction provision). Kimbro is a Washington resident and ARCO is a foreign (Pennsylvania) corporation with principal place of business in California. Plaintiff seeks damages in excess of $10,000. The Court also has pendent jurisdiction over state law claims alleged.

2. Plaintiff's cluster migraine and back conditions are handicaps within the meaning of the state Law Against Discrimination, R.C.W. ¶49.60.

3. ARCO did not terminate or unlawfully discrimination (*sic*) against Plaintiff because of a handicap, in violation of the state Law Against Discrimination, nor fail to make a legally required accommodation for Plaintiff's handicaps.

a. Kimbro had a duty to advise ARCO management and his supervisor's superiors of his handicap and the accommodation he needed from ARCO. While his supervisor knew of the problems he was having, Kimbro should have realized that the supervisor's superiors did not know, and should have advised them himself.

b. Because ARCO management did not know of Kimbro's handicap, its discharge of him without making reasonable accommodation of the handicap did not violate the Law Against Discrimination, R.C.W. ¶49.60.

4. Plaintiff was not disciplined or discharged in violation of his employment contract or employment policies binding upon ARCO. Under ARCO's sick leave and attendance control policies as it had interpreted them, employees could be terminated for absences caused by legitimate illness or injury covered by the sick leave plan, and even though their sick leave allowances had not been exhausted.

5. Plaintiff was not terminated to prevent his use of company benefits, or in retaliation for prior use of company benefits, in violation of ERISA.

6. Defendant did not violate ERISA by failing to inform Plaintiff of, or assist him to obtain, disability, sick pay or other benefits protected by ERISA. While it may have been desirable to encourage or assist Plaintiff in seeking disability or other benefits, ERISA's requirements to provide information to Plaintiff about ARCO's employee benefit plans were met. No legal requirements for providing information or assistance about such benefits were unsatisfied.

7. Plaintiff's discipline and discharge did not constitute the tort of wrongful discharge under Washington state law.

8. Plaintiff's action should be dismissed.

The clerk is directed to enter judgment consistent with these Findings of Fact and Conclusions of Law.

DATED this ____ day of _____, 1987.

UNITED STATES DISTRICT COURT JUDGE

Presented By:
RAAS, JOHNSEN, GARRETT & STUEN
Thomas E. Stuen
Deborra E. Garrett
Attorneys for Plaintiff

Approved as to Form; Notice of Presentment Waived; Copy Received:
GRAHAM & DUNN
Clemens H. Barnes
Attorneys for Defendant

APPENDIX G

49.60.180 Unfair practices of employer defined. It is an unfair practice for any employer:

(1) To refuse to hire any person because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap, unless based upon a bona fide occupational qualification: *Provided*, That the prohibition against discrimination because of such handicap shall not apply if the particular disability prevents the proper performance of the particular worker involved.

(2) To discharge or bar any person from employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap: *Provided*, That it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the commission by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes.

(4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination as to age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap, or any intent to

make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification: *Provided*, Nothing contained herein shall prohibit advertising in a foreign language. [1985 c 185 § 16; 1973 1st ex.s. c 214 § 6; 1973 c 141 § 10; 1971 ex.s. c 81 § 3; 1961 c 100 § 1; 1957 c 37 § 9. Prior: 1949 c 183 § 7, part; Rem. Supp. 1949 § 7614-26, part.]

(2)

No. 89-1811

Supreme Court, U.S.
FILED
JUN 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

ATLANTIC RICHFIELD COMPANY, INC.,

Petitioner,

v.

DANIEL KIMBRO,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

To Petition For Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

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June 14, 1990

eBCD Legal Printers, Seattle, WA

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Respondent, Daniel Kimbro ("KIMBRO"), opposes the Petition for Writ of Certiorari served May 15, 1990, by Atlantic Richfield Company, Inc. ("ARCO").

QUESTION PRESENTED FOR REVIEW

Whether the Ninth Circuit Court of Appeals erred in its application of the rule that a District Court's oral opinion may be utilized to interpret and augment consistent written findings of fact. The threshold issue is whether this substantive issue merits review by this Court.

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STATEMENT OF THE CASE

A. Introduction

Originally filed in state court and removed by ARCO on diversity grounds, this case raises factual issues of reasonable accommodation of an employee's handicap under Washington state law.

Daniel Kimbro was a ten-year handicapped employee who was fired when his handicap prevented his meeting ARCO's newly-established attendance standards. No accommodation to his handicap was offered or made. KIMBRO contended at trial that reasonable accommodation would have permitted him to keep his job. He proposed three specific accommodations.

In a detailed oral opinion, the trial court found that KIMBRO's condition (a neurological impairment known as cluster migraine) is a handicap under Washington law, and that one of the accommodation theories KIMBRO had urged at trial, allowing him a leave of absence to endure an acute phase and to seek effective medical treatment, would have been a reasonable accommodation. Characterizing ARCO's treatment of KIMBRO as "shabby," and expressing regret at the decision, the trial court dismissed the case as a matter of law on agency principles, refusing to impute KIMBRO's supervisor's knowledge of his handicap to ARCO. Resolution of the reasonable accommodation issue therefore was not necessary to the holding. Thus, the court's statements on reasonable accommodation were not incorporated in its Findings and Conclusions, despite the court's clear statement that reasonable accommodation was possible but had not been made.

In a 3-0 decision, the Ninth Circuit Court of Appeals reversed the agency decision, finding ARCO responsible to provide reasonable accommodation because KIMBRO's direct supervisor had knowledge of his handicap. ARCO's petitions for rehearing and for rehearing *en banc* both were denied. Order, Appendix D.

ARCO does not dispute the Ninth Circuit's decision reversing on the agency issue. ARCO contends that this Court should review a factual issue: whether the District Court's oral opinion regarding reasonable accommodation (which was adopted by the Ninth Circuit) was consistent with the District Court's Findings and Conclusions (which did not address the reasonable accommodation issue due to the court's erroneous holding on the agency issues).

This is a factual issue which does not merit review by this Court. Supreme Court Rule 10.1.

B. Discussion of Background Facts and State Law

Under the Washington State Law Against Discrimination, Wash. Rev. Code §§49.60.010, .030 and .180, an employer is required to make "reasonable accommodation" of an employee's handicap, and is liable in damages for failure to do so. What constitutes a "reasonable accommodation" is a question of fact. *Reese v. Sears Roebuck & Co.*, 107 Wash.2d 563, 731 P.2d 497 (1987); *Dean v. Metropolitan Seattle*, 104 Wash.2d 627, 708 P.2d 393 (1985).

At trial, KIMBRO proposed three accommodations which would have permitted him to keep his job. Extensive evidence and argument were heard on each. The three proposed accommodations were:

1. Continuing the past practice allowing him to use accumulated sick leave to cover handicap-related absences:

2. Continuing the past practice allowing him to make up lost time due to his handicap by working after normal operating hours; and

3. Granting a leave of absence in June, 1981 (when he was terminated) to allow him to make it through an acute phase of his handicap and seek long-term effective treatment for the condition.

The trial court discussed all three of these options in the oral opinion. It concluded that the first two were not practical, but that the third, a leave of absence, would have been a reasonable accommodation. None of these findings was specifically set forth as factual findings, in view of the court's conclusion that "because ARCO management did not know of KIMBRO's handicap, its discharge of him without making reasonable accommodation of the handicap did not violate the Law Against Discrimination, RCW 49.60." (Conclusion of Law 3, Appendix B to Petition.) Written findings on specific options

for reasonable accommodation were not germane to a decision finding no obligation to accommodate. The trial court's views on reasonable accommodation were clear from the oral opinion, and the Findings and Conclusions were consistent with that opinion.

The Ninth Circuit reversed the trial court's resolution of the agency issue, holding that KIMBRO's supervisor's knowledge of his medical condition and handicap must be imputed to ARCO under agency principles of Washington state law. *See* Opinion of Ninth Circuit, Appendix C, at C14-15; *Zwink v. Burlington Northern Company*, 13 Wash. App. 560, 566, 536 P.2d 13, 17 (1975) (quoting 3 Am.Jur.2d *Agency* §273 at 635 (1962); Restatement (2d) of Agency §268 *et seq.*) (ARCO does not contest the reversal.)

Once the agency issue had been resolved and ARCO's duty to make reasonable accommodation established, the Court of Appeals relied on the trial court's oral opinion and findings on the accommodation issue. *Southern Pacific Land Company v. United States*, 367 F.2d 161, 162 n.1 (9th Cir. 1966), *cert. denied*, 386 U.S. 1030. The court also noted that "no evidence in the record even remotely suggests that offering KIMBRO a leave of absence in 1981 would have placed an undue hardship on ARCO," a defense which ARCO had the burden of proving under Washington Law. Wash. Admin. Code §162-22-080.

ARGUMENT

The Petition for Certiorari should be denied because the issue presented does not meet this Court's standard for review. The issue is factual, and plainly frivolous in view of Washington state law. Its resolution will affect no one except the parties to this case.

A. The Issue Presented Does Not Meet this Court's Standards For Review

This petition asks this Court to review the decision of the Ninth Circuit for consistency with the trial court's oral opinion. The rule that an appellate court may properly consider a trial court's oral opinion consistent with its formal findings is not challenged. Instead, the assertion is that the rule did not apply here because, as a factual matter, the oral opinion and written findings were in some way inconsistent.

This issue does not merit review by this Court. Whether an oral opinion is consistent with written findings on a factual issue is itself a factual question of language construction. This does not meet any of this Court's standards for review, articulated in Supreme Court Rule 10.1.

The Ninth Circuit decided this case properly, but even if that were not the case, the issue would be confined to this case. The case presents no general question or problem likely to affect others in the future. Thus, any alleged error would not merit this Court's review. In the words of Justice Stevens,

> Most certainly, this Court does not sit primarily to correct what we perceive to be mistakes committed by other tribunals.

Watt v. Alaska, 451 U.S. 259, 275, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981) (Stevens, J. concurring); *see also Rudolph v. United States*, 370 U.S. 269, 82 S.Ct. 1277, 8 L.Ed.2d 484, *rehearing denied* 371 U.S. 854, 83 S.Ct. 15, 9 L.Ed.2d 93 (1962).

B. The Petition Plainly Lacks Merit.

ARCO's petition does not cite any finding of the District Court which it claims is inconsistent with the oral opinion, which was:

> . . . In my opinion they could make accommodations, reasonable accommodations, which they did in the past. . . . They could have accommodated him by allowing him to use sick leave, had he asked for it; given him a leave of absence, had he asked for it . . .

Oral Findings, at A-2.

There was no inconsistency between this and the court's conclusion that:

> [B]ecause ARCO management did not know of KIMBRO's handicap, its discharge of him without making reasonable accommodation of the handicap did not violate the Law Against Discrimination, RCW 49.60.

Conclusion of Law No. 3., Petition Appendix B-10.

Because the District Court dismissed the case on the agency issue, no findings were necessary on the reasonable accommodation issue. A trial court is not required to make unnecessary findings. *Nuelsen v. Sorensen*, 293 F.2d 454, 459 (9th Cir. 1961); *Immigration and Naturalization Service v. Bagamasbad*, 429 U.S. 24, 97 S.Ct. 200, 50 L.Ed.2d 190, 192 (1976). The trial court's oral opinion was strong and unambiguous; any finding on the issue would have necessarily repeated it.

ARCO's reliance on Conclusion of Law No. 3 is misplaced. Conclusion 3 is based entirely on the agency issue, which is not before this Court. The text of Conclusion No. 3, with emphasis added to the critical last sentence, is:

> 3. ARCO did not terminate or unlawfully discriminate against plaintiff because of a handicap, in violation of the state Law Against Discrimination, nor fail to make a legally required accommodation for plaintiff's handicaps. Furthermore, Kimbro had a duty to advise ARCO management and his supervisor's superiors of his handicap and

> the accommodation he needed from ARCO. While his supervisor knew generally that Kimbro occasionally experienced severe headaches, Kimbro should have realized that the supervisor's superiors did not know, and should have advised them himself. *Because ARCO management did not know of Kimbro's handicap, its discharge of him without making reasonable accommodation of the handicap did not violate the Law Against Discrimination. RCW 49.60.*

Concusion of Law No. 3, Petition App. B-10 (emphasis added).

Thus the trial court concluded that ARCO was excused from making the accommodation that would be required otherwise, *only* because it believed ARCO did not know of KIMBRO's handicap. That conclusion was reversed, leaving the inescapable conclusion that ARCO had failed to make a legally required accommodation.

ARCO's reliance on *Phillips v. City of Seattle*, 111 Wash.2d 903, 766 P.2d 1099 (1989) is also misplaced. That case concerned the special circumstances of alcoholism, a condition whose status as a handicap is evaluated on a case-by-case basis under Washington law. The employer was not liable in the *Phillips* case because it was determined as a factual matter that the alcoholism of the particular employee involved was not a cognizable handicap under Washington state law. In this case, KIMBRO's handicap is not at issue.

A misstatement of the record should be corrected. The Petition states that KIMBRO did not urge a leave of absence as a reasonable accommodation at the trial in this case. That is not true. At trial, KIMBRO elicited detailed information from ARCO's personnel manager about its leave of absence policies, all of which were in evidence. Excerpts of that testimony are included at Appendix H. Additionally, the issue was urged strongly (and persuasively) in closing argument; transcription may be obtained if necessary. In any event this

is a red herring: under Washington law, the employer has an affirmative duty to come forward with available options for accommodation, regardless of any request or lack of request from the employee. *Dean v. Metropolitan Seattle*, 104 Wn.2d 627, 708 P.2d 393 (1985). The Court of Appeals noted in its opinion that ARCO appeared to concede this point at oral argument (Ninth Circuit Decision, Appendix C, at C-17.)

Lastly, the cases cited by ARCO are inapposite and weigh against its position here. In each of those cases the oral opinion and findings and conclusions were inconsistent. Our case does not rise to that level: we have only a contention that failure to make a finding unnecessary to the court's holding somehow contradicts the clear statements made in the oral opinion and adopted on appeal. This is a spurious contention.

PRAYER FOR DISMISSAL

The petition raises issues which do not merit review by this Court, and plainly lacks merit in light of Washington state law and the factual background of this case. The petition should be dismissed.

Respectfully submitted this 14th day of June, 1990.

RAAS, JOHNSEN, GARRETT & STUEN, P.S.
Deborra E. Garrett
Attorneys for Respondent

APPENDIX H

Trial Testimony (Excerpted) of ARCO Employee Relations Manager Anthony Mickas (Trial Transcript pp. 543-580)

Page	*Line*	
P.543	L.11	Q. (by KIMBRO's attorney D. Garrett) What is your position?
	L.12	A. I'm in Employee Relations at the Cherry Point Refinery.
	L.13	Q. Are you the manager of the Employee Relations Department?
	L.14	A. Yes, I am.
		. . .
	L.21-23	Q. . . . One of your jobs is to manage the department that has primary responsibility for administering benefit plans. Right?
	L.24	A. Yes.
	L.25-	Q. And your department also has primary
P.544	L.1	responsibility for administering personnel policies. Right?
	L.2	A. Yes.
		. . .
P.568	L.14-17	Q. So is it fair to say that the Policies and Procedures Manual sets out policies and instructions for the administration of personnel policies and benefits? Is that a fair characterization?

Page *Line*

L.18 A. They are the basic guidelines for policy administration.

L.19-22 Q. Okay. This particular one that we're looking at says anticipated disability, leave of absence, and it's dated September 14th, 1981. Is it a continuation of a policy that existed previous to September 14th, 1981?

L.23-24 A. I would believe that this would be the same policy in effect when Kimbro was on the payroll.

. . .

P.569 L.9-13 Q. This is the only one we've look [sic] at here on anticipated disability leave of absence, but take a look through it and tell me if the policy that we have in here as Exhibit 19 is significantly different in any way that you can see from the one that was in effect when Kimbro was on the payroll?

L.14 A. It's the policy.

L.15-21 Q. Okay. Now I'd like you to take a look at the first page and read along with me, make sure I've got it right.

> "Purpose: The anticipated disability leave of absence is a voluntary leave which may be requested by an eligible employee and granted at the discretion of the company."

With me so far?

L.22 A. Yes, I am.

L.23-P.570 L.7 Q. Okay.

Page *Line*

"The purpose of this policy is to provide the conditions for granting a reasonable time off surrounding an employee's planned medical disability. This leave grants to eligible employees personal time off without pay during their non-disability absence and insures continued eligibility for company sick pay benefits during medical disability which has been certified by a physician."

Did I read that paragraph right?

L.8 A. Yes, you did.

L.9-15 Q. Okay. Now I'd like you to take a look at the second page, commencement of leave, and I think the gist of that paragraph is simply to say that this kind of leave can be granted for any reasonable period of time with a maximum of — that it should not occur in a way that allows it to total more than six months when it's combined with disability or sick leave. Is that right?

L.16 A. That's right.

. . .

P.571 L.15-17 Q. So this is a way of giving somebody a leave without pay, essentially, when it's associated with disability; is that right?

L.18 A. Yes, it is.

L.19-20 Q. Okay. Whose okay has to be given for a person to take this kind of leave?

L.21-24 A. The policy stipulates who the authorities are required — or approvals that are required.

Page	*Line*	
		I believe it's two members of management and Employee Relations that have to sign the specific section. That's my basic understanding.
P.572	L.25-L.1	Q. So this is done within the refinery. You don't need to get approval from Los Angeles or anything like that?
	L.2.	A. No.
		. . .
P.572	L.15-16	Q. And then we have some information after that about formal leaves of absence without pay; is that right?
	L.17	A. Yeah. That's the next page.
	L.18-19	Q. And it lists the types of formal leaves of absence without pay that are available to people; is that right?
	L.20	A. That's right.
	L.21-23	Q. Now, No. 2 there is disability leave of absence. That's not the same thing as what we've just been talking about, is it?
	L.24	A. No. It's different.
P.573	L.25-L.2	Q. Okay. Disability leave of absence occurs when employees have exhausted their disability benefits and remain disabled; is that right?
	L.3	A. Yes.
	L.4-6	Q. The other type or another type of formal leave of absence without pay is listed in No. 1, leave of absence without pay for personal business.

Page	*Line*	
	L.7	A. That's right.
		. . .
P.574	L.8-10	Q. Okay. No. 4 says leave of absence for educational reasons. Is that another type of leave without pay for personal reasons or is that —
	L.11-12	A. It's the same. Any leave in excess of thirty-one days would be a formal leave of absence.
	L.13-14	Q. Okay. So that's the situation you were just describing, a leave for purposes of education. Right?
	L.15	A. That's the example where the requests have come in.
	L.16	Q. Okay. Where does this document come from?
	L.17-18	A. This is also part of the Policies and Procedures in the Employee Relations office.
		. . .
P.575	L.10-11	Q Has anybody applied for this kind of leave because of a disability or health related problem?
	L.12	A. Not for this type of formal leave of absence. No.
	L.13-14	Q. Have others applied for leaves of absence for health related reasons?
	L.15	A. Yes.
	L.16	Q. Who are those people?
	L.17-23	A. Well, we have 86 females that work at the refinery and probably about 23 of them have applied for formal leaves of absence due to

Page	*Line*	
		maternity cases. In the male population that's probably happened — I haven't been there all 15 years and I'm obviously guessing at the eight or nine years I have been there — that's probably happened about nine, ten times, somewhere in that range.
		. . .
P.579	L.20-22	Q. Okay. Essentially, all these documents, do they come out of ARCO manuals that describe the policies and procedures and how they are to be administered?
	L.23-24	A. With the exception of the ones we've already talked about?
P.580	L.25-L.1	Q. Yeah. With the exceptions of the ones we've talked about.
	L.2-5	A. Well, I know that all these policies and procedures are in the manual. With regard to this reference letter, I'm not sure where you got that from, or what file I gave it to you from. I would suspect that's where it came from.
	L.6-7	Q. Okay. It probably came from your correspondence file, don't you think?
	L.8	A. It's possible.
	L.9	Q. It's stamped with your name, received, A. Mickas?
	L.10	A. Yes.
	L.11-13	Q. So that would probably indicate to you that it came from one of your files; is that right? We don't have a question that it's authentic, do we?

Page *Line*

L.14 A. No. It's fine.

L.15-17 Q. Okay. The other information setting forth the various kinds of leaves of absence, they come from ARCO manuals and documents that describe those kinds of leaves; is that right?

L.18 A. Yes.

L.19 Q. I think we can go on to the next one. That's Exhibit 20.

L.20 A. Are you finished with this one?

L.21 Q. Yes.

L.22 A. There's a lot left in this one.

L.23 THE COURT: She doesn't want to go into it.

APPENDIX I

Washington Administrative Code §162-22-080

WAC 162-22-080 Accomodation to handicapped employees. (1) It is an unfair practice for an employer to fail or refuse to make reasonable accommodations to the sensory, mental, or physical limitations of employees, unless the employer can demonstrate that such an accommodation would impose an undue hardship on the conduct of the employer's business.

(2) It is an unfair practice for an employer to refuse to hire or otherwise discriminate against an able handicapped worker because the employer will be subject to the requirements of this section if the worker is hired, promoted, etc.

(3) The cost of accommodating an able handicapped worker will be considered to be an undue hardship on the conduct of the employer's business only if it is unreasonably high in view of the size of the employer's business, the value of the employee's work, whether the cost can be included in planned remodeling or maintenance, the requirements of other laws and contracts, and other appropriate considerations.

[Order 23, § 162-22-080, filed 7/21/75.]